This writing sample is an excerpt from a longer prelitigation memo that summarizes factual and legal arguments in preparation for a lawsuit as part of the Civil Rights Clinic. All references to specific states or entities have been omitted. Some facts have also been altered to preserve anonymity. This memo is being shared with permission from my professors.

To: Deborah Archer & Joe Schottenfeld
From: Helen Griffiths
Subject: Prelitigation Memo
Date: April 25, 2023

I. Introduction

As prior memos, extensive conversations, and fact research make clear, children in the state are being over-institutionalized in harmful conditions. This memo details possible legal claims. We are considering claims under 1) the Medicaid Act, 2) the Americans with Disabilities Act & § 504 of the Rehabilitation Act, 3) the False Claims Act, and 4) substantive due process.

Given current information, Medicaid, ADA/Rehab, and False Claims present the strongest claims, dependent on facts. Substantive due process is viable but requires finding state action. As we work to secure local counsel and identify clients, this analysis may change.

II. Analysis

A. Substantive Due Process

We are considering a 42 U.S.C. § 1983 lawsuit alleging a violation of the Fourteenth Amendment's substantive due process right to safe physical conditions while in involuntary state custody. However, the line of cases developing this substantive due process right concerns state-run facilities. Since [redacted] is a private facility, we must first show that there is state action sufficient to support a Fourteenth Amendment claim. This is a highly fact-intensive inquiry with numerous different tests. Assuming we are able to show that there is state action, we would then need to allege a violation of a protected liberty interest. This would be easily satisfied under *Romeo*. We would also have to show that the [redacted] administrators departed from accepted professional judgment, violating the plaintiff's right to safety at the facility. This is likely also satisfied. An alternative avenue to bringing a substantive due process claim would be to sue the state for the actions of a third party, in this case, [redacted]. In order to bring a substantive due process claim against the state for their failure to act and protect the liberty interests of children at [redacted], we would need to show a special relationship or state-created danger exception. Again, we could likely show that one or both of these exceptions exist.

The elements necessary to bring a substantive due process violation are not difficult to meet in this case. Instead, the complications concern the fact that [redacted] is a private entity. Whether we sue [redacted] or the state for [redacted]'s actions, we must navigate threshold issues involving multi-factor tests before reaching the merits of the substantive due process claim. Overall, it is more likely we would want to bring the claim against [redacted]. We have a strong argument for a close nexus between [redacted] and the state sufficient to find state action, as well as evidence to suggest a departure from the reasonable professional standard that amounts to a violation of children's protected liberty interests.

1. Suing a Private Actor for a 14th Amendment Violation

a. Necessity of Finding State Action When Suing a Private Party

To succeed on a Section 1983 claim, a plaintiff must show that "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right."[1] Section 1983 provides remedies for deprivations of rights under the Constitution and laws of the United States when the deprivation takes place "under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory."[2] The Supreme Court has found that "Section 1983 excludes from its reach merely private conduct, no matter how discriminatory or wrong."[3] Similarly, the Ninth Circuit ruled that Section 1983 is only an appropriate cause of action when "the alleged injury is caused by state action and not by merely a private actor."[4] Thus, a threshold question in a Section 1983 suit is whether the challenged action took place "under color of state law."[5] Much like Section 1983 claims, "a violation of the plaintiff's constitutional rights cognizable under the Fourteenth Amendment can occur only by way of state action."[6] The Supreme Court has found that conduct actionable under Section 1983's "under color of law" requirement is equivalent to the "state action" requirement under the Constitution.[7]

b. Finding State Action When Suing a Private Party

Since the default assumption is that "private parties are not generally acting under color of state law," in order for private conduct to constitute governmental action, "something more" must be present.[8] The plaintiff bringing the suit against the private party bears the burden of establishing by a preponderance of the evidence that this "something more" exists.[9] To establish whether the private party is acting under color of state law, the Ninth Circuit first identifies the "specific conduct of which the plaintiff complains."[10] After all, "[a]n entity may be a state actor for some purposes but not for others."[11] In our claim, we would likely challenge the unsafe conditions at [redacted]. The relevant inquiry is therefore whether the "defendants' role as custodians, as litigants, or as medical professionals constituted state action."[12]

There are several Supreme Court cases where the "defendant is a private party and the question is whether his conduct has sufficiently received the imprimatur of the State so as to make it 'state' action for

[1] Patel v. Kent Sch. Dist., 648 F.3d 965 (9th Cir. 2011) (finding that since the parties did not dispute that the defendant was acting under color of state law, the sole issue is whether the defendant deprived the plaintiff of any federally protected right).
[2] 42 U.S.C. § 1983 ("Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights . . . secured by the Constitution and laws, shall be liable to the party injured.").
[3] Blum v. Yaretsky, 457 U.S. 991, 1002 (1982) (quoting Shelley v. Kraemer, 334 U.S. 1, 13 (1948)).
[4] Jensen v. Lane Cnty., 222 F.3d 570, 574 (9th Cir. 2000).
[5] Jackson v. Metro. Edison Co., 419 U.S. 345, 348 n.2 (1974).
[6] Rawson v. Recovery Innovations, Inc., 975 F.3d 742, 747 (9th Cir. 2020). Since the Fourteenth and Fifth Amendments are directed at the State, courts have held that they offer "no shield" against private conduct and can only be violated by conduct that is characterized as state action. *Kraemer*, 334 U.S. at 14; Lugar v. Edmondson Oil Co., 457 U.S. 922, 924 (1982).
[7] United States v. Price, 383 U.S. 787, 794 n.7 (1966) ("In cases under § 1983, 'under color' of law has consistently been treated as the same thing as the 'state action' required under the Fourteenth Amendment."). *See also* Rendell-Baker v. Kohn, 457 U.S. 830, 838 (1982) (quoting *Lugar*, 457 U.S. at 937) ("The ultimate issue in determining whether [the Defendants are] subject to suit under § 1983 is the same question posed in cases arising under the Fourteenth Amendment: is the alleged infringement of federal rights 'fairly attributable to the State?'"); Kitchens v. Bowen, 825 F.2d 1337, 1340 (9th Cir. 1987) (quoting Geneva Towers Tenants Org. v. Federated Mortgage Investors, 504 F.2d 483, 487 (9th Cir. 1974)) (finding that "the standards utilized to find federal action . . . are identical to those employed to detect state action.").
[8] Price v. Hawaii, 939 F.2d 702, 707-08 (9th Cir. 1991), *cert. denied*, 503 U.S. 938 (1992); *Lugar*, 457 U.S. at 939 ("Action by a private party pursuant to [section 1983] without something more, was not sufficient to justify a characterization of that party as a 'state actor.'").
[9] Flagg Bros. v. Brooks, 436 U.S. 149, 156 (1978).
[10] Caviness v. Horizon Cmty. Learning Ctr., Inc., 590 F.3d 806, 812 (9th Cir. 2010) (quoting Am. Mfrs. Mut. Ins. Co. v. Sullivan, 526 U.S. 40, 51 (1999)).
[11] George v. Pacific–CSC Work Furlough, 91 F.3d 1227, 1230 (9th Cir.1996).
[12] *Rawson*, 975 F.3d at 747.

purposes of the Fourteenth Amendment."[13] The Supreme Court has articulated at least seven approaches to the issue.[14] Different Ninth Circuit cases have sought to distill these approaches into a number of tests to assess state action, all while finding that the Supreme Court failed to characterize whether "these different tests are actually different in operation or simply different ways of characterizing the necessary fact-bound inquiry."[15] Generally, the tests are: (1) public function; (2) joint action; (3) governmental compulsion or coercion; and (4) governmental nexus.[16] As the Ninth Circuit summarizes: "The Supreme Court, even in its most recent pronouncement on state action, does not clarify whether and when one test or another should be applied to a particular fact situation."[17] As a result, the Ninth Circuit has been reluctant to endorse a singular approach, though the Court has held that "satisfaction of any one test is sufficient to find state action, so long as no countervailing factor exists."[18] Generally, the Ninth Circuit favors applying the close nexus test, which is also the most vague and open-ended.[19] The joint action or close nexus tests are likely the easiest for us to satisfy.

While these tests provide some helpful guiding principles, it is difficult to predict exactly how these facts would shake out. The Supreme Court has repeatedly cautioned that while the principle of "state action" is "easily stated, the question of whether particular discriminatory conduct is private, on the one hand, or amounts to 'state action,' on the other, frequently admits of no easy answer."[20] The Supreme Court acknowledges this issue lacks any consistency and the Ninth Circuit remarked on the "murkiness shrouding this area of law."[21] That ambiguity is because the inquiry into state action is highly fact intensive and courts do not apply the same test in the same way.[22] Overall, the Supreme Court found: "What is fairly attributable [as State action] is a matter of normative judgment, and the criteria lack rigid simplicity.... [No] one fact can function as a necessary condition across the board ... nor is any set of circumstances absolutely sufficient, for there may be some countervailing reason."[23] As a result, it is unclear how a court would rule concerning a finding of state action in our case, though there is likely evidence sufficient to satisfy a close nexus test.

Finally, there is clear Ninth Circuit precedent that "when purely private actors obtain the help of a private physician to bring about the involuntary admission and detention of an allegedly mentally ill person for psychiatric examination," there is no state action.[24] Thus, it might be difficult to bring a challenge if the plaintiff was committed after approval from their parents, since they are private actors, acting with the aid and oversight of [redacted], another private employee. It would be a stronger challenge if the plaintiff were in the foster care system as this would implicate state involvement. The analysis below thus assumes our plaintiff is a foster child involuntarily committed.

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[13] *Blum*, 457 U.S. at 102. *See, e.g.*, *Flagg Bros.*, 436 U.S. at 149; *Jackson*, 419 U.S. at 345; Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); Adickes v. S. H. Kress & Co., 398 U.S. 144 (1970).
[14] Lee v. Katz, 276 F.3d 550, 554 (9th Cir. 2002).
[15] Gorenc v. Salt River Project Agr. Imp. & Power Dist., 869 F.2d 503, 506 (9th Cir. 1989).
[16] *Lee*, 276 F.3d at 554.
[17] Kirtley v. Rainey, 326 F.3d 1088, 1095 (9th Cir. 2003).
[18] *Id.* at 1093. *See, e.g.*, *George*, 91 F.3d at 1230; *Gorenc*, 869 F.2d at 506.
[19] Grijalva v. Shalala, 152 F.3d 1115, 1119 (9th Cir. 1998).
[20] *Moose Lodge*, 407 U.S. at 172.
[21] *George*, 91 F.3d at 1230.
[22] Burton v. Wilmington Parking Auth., 365 U.S. 715, 722 (1961) ("Only by sifting facts and weighing circumstances can the nonobvious involvement of the State in private conduct be attributed its true significance."); Howerton v. Gabica, 708 F.2d 380, 383 (9th Cir. 1983) ("While these factors are helpful in determining the significance of state involvement, there is no specific formula for defining state action."); *Lugar*, 457 U.S. at 939 ("The Court suggested that 'something more' which would convert the private party into a state actor might vary with the circumstances of the case."); Ouzts v. Maryland Nat'l Ins. Co., 505 F.2d 547, 550 (9th Cir. 1974) ("It is also a truism by now that there is no rigid formula for measuring state action for purposes of section 1983 liability.").
[23] Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n., 531 U.S. 288, 295-96 (1974).
[24] *Jensen*, 222 F.3d at 574.

(i) Public Function Test

Under the public function test, "when private individuals or groups are endowed by the State with powers or functions governmental in nature, they become agencies or instrumentalities of the State and subject to its constitutional limitations."[25] Essentially, "if a private actor is functioning as the government, that private actor becomes the state for purposes of state action."[26] To satisfy the public function test, the private entity must be exercising a power or function both traditionally and exclusively governmental.[27] The more a private actor opens up their property or product for "use by the public in general, the more do his rights become circumscribed by statutory and constitutional rights of those who use it."[28]

The Ninth Circuit has applied a version of this test to find state action in a suit where a patient involuntarily committed at a private hospital brought a Section 1983 action against the operator of the hospital for forcibly injecting him with antipsychotic medications in violation of his Fourteenth Amendment due process rights. The Court considered whether the defendant "exercised power 'possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law.'"[29] The Court found that: "Any deprivation effected by Defendants here was in some sense caused by the State's exercise of its right, pursuant to both its police powers and parens patriae powers, to deprive [plaintiff] of his liberty for an extended period of involuntary civil commitment. In that sense, Defendants were 'clothed with the authority of state law' when they detained and forcibly treated [the plaintiff] beyond the initial 72-hour emergency evaluation period."[30] While the Supreme Court has held that mental health commitments do not constitute a function "exclusively reserved to the State," the Ninth Circuit found that since the private actors were relying on the state's power to civilly commit people, any misuse of this power, such as violating the plaintiff's right to "liberty, refusal of treatment, and/or due process," was an action under color of state law.[31] We could similarly argue that [redacted] exercised state power when holding children following involuntary commitment proceedings, rendering their actions "under color of state law." However, we are more likely to succeed by using this argument to support the joint action test below than to satisfy the public function test. [Redacted] can neither detain nor forcibly treat a mental health patient past an initial 72-hour emergency evaluation period without a court order. Thus, the government still retains the ultimate power to involuntarily commit and hold children.

(ii) Compulsion Test

Under the compulsion test, a private actor's conduct is attributable to the state when the state exerts coercive power over the private entity or provides significant encouragement.[32] Under this test, a private entity does not act as the state unless some state law or custom requires a certain course of action.[33] The compulsion analysis is most often applied in cases in which the government itself compels a certain outcome, such as a city ordinance requiring racial segregation or a city ordinance banning sit-ins, and in which the private entity, while engaging in the unlawful act, was pressured to do so.[34] Here, the state is not compelling [redacted] to violate children's substantive due process rights through any statute. While there is a statutory scheme concerning the involuntary commitment process, there is no statute requiring subpar conditions, which is the issue we are challenging. We could, however, argue that there is significant encouragement since the state sends considerable funds to [redacted]. In 2018, 30% of all children on

[25] Evans v. Newton, 382 U.S. 296, 299 (1966).
[26] *Gorenc*, 869 F.2d at 508.
[27] *Rendell–Baker*, 457 U.S. at 842.
[28] Marsh v. Alabama, 326 U.S. 501, 506 (1946).
[29] *Rawson*, 975 F.3d at 746; West v. Atkins, 487 U.S. 42, 49 (1988) (quoting United States v. Classic, 313 U.S. 299, 326 (1941)).
[30] *Rawson*, 975 F.3d at 752.
[31] *Id. See also Jackson*, 419 U.S. at 352.
[32] *Flagg Bros*., 436 U.S. at 164–65; *Adickes*, 398 U.S. at 170-71.
[33] *George*, 91 F.3d at 1233.
[34] Peterson v. City of Greenville, 373 U.S. 244 (1963); Lombard v. Louisiana, 373 U.S. 267, 271 (1963).

Medicaid receiving out-of-home behavioral health care were at [redacted].[35] The state channeled $18,000,000 in state funds to [redacted] in 2018.[36] Between 2016 to 2020, the state paid $125 million in reimbursements to [redacted].[37] In response to our evidence of state funding, [redacted] could refer to Supreme Court cases noting that substantial funding for private actors is not sufficient to transform the party's conduct into state action, or a Ninth Circuit case finding that a private hospital's receipt of federal funds, coupled with federal and state tax exemptions, did not constitute state action.[38] It is unlikely that the state's funding of [redacted] is sufficient to show compulsion, but it would be a factor to consider under the joint action and close nexus tests below.

(iii) Joint Action Test

Under the joint action test, private actors will be considered state actors where they are "willful participant[s] in joint action with the State or its agents" or where the state has "so far insinuated itself into a position of interdependence with the [private actor, such] that it must be recognized as a joint participant in the challenged activity."[39] If the state "knowingly accepts the benefits derived from unconstitutional behavior," then the conduct can be treated as state action.[40] A final factor suggesting joint action concerns the state's Fourteenth Amendment obligation toward those who are involuntarily committed.[41] The Ninth Circuit previously found that a government cannot simply "contract away its constitutional duties" by having private actors, rather than state actors, perform some of the work.[42] Accordingly, there may be joint action when a state has delegated away a portion of its role because the state owes "particular Fourteenth Amendment duties toward persons involuntarily committed" that weigh toward a finding of state action.[43]

We could argue that there is joint action between the state and [redacted]. There are only two acute psychiatric care centers, [redacted] and [redacted], in the state, rendering [redacted] an essential feature of the state's out-of-home behavioral health care.[44] [Redacted] is the only state-run facility and can hold only around ten adolescents.[45] With such low capacity, the state relies on [redacted] to hold the children who need care and there is a close relationship between the state and private entity. Furthermore, this close relationship likely includes contracts between [redacted] and the state to provide services. However, a contract alone is not sufficient to find state action.[46] We could also argue that the state benefits from [redacted]'s confinement of the children since the state has nowhere else to send foster care children with mental health issues.[47] However, the Ninth Circuit has found no joint action exists when benefits "flow directly to [individuals], not to the state itself," even while "in a broad sense" conferring public benefits.[48] [Redacted] would likely argue that their services are to support children, not to aid the state government by helping to compensate for their lack of services and appropriate foster homes. Overall, there may be a joint

[35] [Redacted].
[36] *Id.* at 52.
[37] [Redacted].
[38] *Blum*, 457 U.S. at 1011; Ascherman v. Presbyterian Hosp. of Pac. Med. Ctr., Inc., 507 F.2d 1103, 1104-05 (9th Cir. 1974).
[39] Dennis v. Sparks, 449 U.S. 24, 27 (1980); *Jackson*, 419 U.S. at 357-58.
[40] Nat'l Collegiate Athletic Ass'n v. Tarkanian, 488 U.S. 179, 192 (1988).
[41] Addington v. Texas, 441 U.S. 418, 425 (1979).
[42] Pollard v. GEO Grp., Inc., 629 F.3d 843, 856 (9th Cir. 2010).
[43] *Rawson*, 975 F.3d at 753.
[44] [Redacted].
[45] *Id.*
[46] *Rendell-Baker*, 457 U.S. at 840 (facing the question "whether a private school, whose income is derived primarily from public sources and which is regulated by public authorities, acted under the color of state law when it discharged certain employees" and finding that private actors, whether schools, nursing homes or "private corporations whose business depends primarily on contracts to build roads, bridges, dams, ships, or submarines for the government," are not state actors "by reason of their significant or even total engagement in performing public contracts.").
[47] [Redacted].
[48] *Rawson*, 975 F.3d at 1093.

action claim concerning the coordination between the state and [redacted] to detain children, but it is likely easier to apply those facts to satisfy the close nexus test.

(iv) Close Nexus Test

Under the close nexus test, there is state action "only if there is such a 'close nexus between the State and the challenged action' that seemingly private behavior 'may be fairly treated as that of the State itself.'"[49] The essential question in this test is whether the state has become "to some significant extent" involved in the conduct of the affairs of a private institution.[50] For example, in a case of first impression concerning a combined close nexus/joint action test, the Ninth Circuit found that a private psychiatrist was a state actor, because the psychiatrist and the county had: "[U]ndertaken a complex and deeply intertwined process of evaluating and detaining individuals who are believed to be mentally ill and a danger to themselves or others. County employees initiate the evaluation process, there is significant consultation with and among the various mental health professionals, and [Psychiatric Associates] helps to develop and maintain the mental health policies of [the county hospital]."[51]

Similarly, we could argue that there is a "complex and deeply intertwined" process between the state and [redacted] that satisfies the "close nexus" test. There are extensive state regulations concerning the involuntary commitment process. Under the state's involuntary commitment statutory scheme, a judge can either conduct a screening investigation or direct a local mental health professional to conduct a screening investigation of a person with a mental health issue.[52] Often, that "mental health professional" is a [redacted] employee. Within 48 hours of the investigation's completion, the judge may issue an order finding probable cause to believe the person is mentally ill and either gravely disabled or presents a likelihood of serious harm to self or others.[53] A treatment facility, such as [redacted], that receives such an order "shall accept the order and the respondent for an evaluation period not to exceed 72 hours."[54] [Redacted] is able to initially hold children only after a court's finding. The facility then must notify the court of the person's arrival, and the court must schedule a commitment hearing "to be held if needed within 72 hours after the respondent's arrival."[55] At the hearing, the person has the right to attend and present evidence.[56] [Redacted] representatives are often also present to report on what they concluded during the 72-hour stay. If, by the end of hearing, the court "finds, by clear and convincing evidence, that the respondent is mentally ill and, as a result, is likely to cause harm to the respondent or others or is gravely disabled," then "the court may commit the respondent to a treatment facility for not more than 30 days."[57] Again, [redacted] can hold children only following a hearing with state oversight. In response to the argument that this statutory scheme delegates state power to [redacted], they might argue that action by a private party pursuant to a state statute is insufficient, standing alone, to render that party a state actor.[58] They might also argue that the Ninth Circuit has found that "[t]he mere fact that a business is subject to state regulations does not by itself convert its action into that of the state for purposes of the Fourteenth Amendment."[59] We could still argue that the role of state authorization and approval in the commitment process weighs in favor of a finding of state action, while the close, continued coordination between the state courts, the state, and [redacted] personnel goes beyond a mere regulation.

[49] *Brentwood Acad.*, 531 U.S. at 295 (quoting *Jackson*, 419 U.S. at 351).
[50] Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961).
[51] *Jensen*, 222 F.3d at 575.
[52] [Redacted].
[53] [Redacted].
[54] [Redacted].
[55] *Id.*
[56] [Redacted].
[57] [Redacted].
[58] Walsh v. Am. Med. Response, 684 F. App'x 610 (9th Cir. 2017).
[59] *Jackson*, 419 U.S. at 350.

Frequently when assessing the question of state action, the Ninth Circuit will consider all the facts alleged under these tests as a whole. For example, in *Jensen*, where the plaintiff brought a Section 1983 action against a private physician alleging unlawful restraint and commitment, the Ninth Circuit concluded that there was state action without explicitly relying on any one test. Instead, the Court cited a long series of evidence: "Given the necessity of state imprimatur to continue detention, the affirmative statutory command to render involuntary treatment, the reliance on the state's police and parens patriae powers, the applicable constitutional duties, the extensive involvement of the county prosecutor, and the leasing of their premises from the state hospital, we conclude that 'a sufficiently close nexus between the state and the private actor' existed here 'so that the action of the latter may be fairly treated as that of the state itself.'"[60] Many of the factors present in Jensen are also present in our case, suggesting the Ninth Circuit could again find state action.

A Tenth Circuit case applying a joint action/close nexus test is also instructive as it involves a suit against the owners and operators of the Provo Canyon School for Boys, a private school and residential treatment facility, alleging violations of Fourteenth Amendment substantive due process rights. The Court found state action: "Many of the members of the class were placed at the school involuntarily by juvenile courts and other state agencies acting alone or with the consent of the parents. Detailed contracts were drawn up by the school administrators and agreed to by the many local school districts that placed boys at the school. There was significant state funding of tuition and, in fact, the school itself promoted the availability of public-school funding in its promotional pamphlet. There was extensive state regulation of the educational program at the school."[61] Many of the facts presented as evidence of state action in that case also exist in ours.

Considering our facts together, we could similarly argue there was state action. After all, the state has delegated the power to detain and treat children to [redacted]; a significant number of children in foster care are held at [redacted]; the state is dependent on [redacted] as the sole provider for children with acute psychiatric needs; significant state funds are sent to [redacted]; the state's Department of Behavioral Health provides some oversight of [redacted]; and the state statutory scheme closely entwines the state and private facility.

2. Elements of a Substantive Due Process Claim

After showing that defendants acted under color of state law, the next step is to show that they deprived the children of a right secured by the Constitution or laws of the United States.[62] The U.S. Constitution forbids governmental deprivation "of life, liberty, or property, without due process of law."[63] This Due Process Clause serves to "provide heightened protection against government interference with certain fundamental rights and liberty interests."[64] In various contexts, the Supreme Court has ruled that this clause imposes substantive limits on government actions when it concerns specifically identified rights.[65] Generally, these rights are tied to an individual's liberty and bodily autonomy.[66] To infringe on these rights, the government must demonstrate sufficient justification.[67] However, unlike procedural due process, substantive due process ensures the right to be free of arbitrary government actions "regardless of

[60] *Jensen*, 222 F.3d at 575 (quoting *Jackson*, 419 U.S. at 350).
[61] Milonas v. Williams, 691 F.2d 931, 940 (10th Cir. 1982).
[62] *Flagg Bros.*, 436 U.S. at 156-57 (1978); Fred Meyer, Inc. v. Casey, 67 F.3d 1412, 1413 (9th Cir.1995).
[63] U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law.").
[64] Washington v. Glucksberg, 521 U.S. 702, 720 (1997); City of Sacramento v. Lewis, 523 U.S. 833, 845-46 (1998).
[65] Moore v. City of East Cleveland, 431 U.S. 494, 502-06 (1977).
[66] Albright v. Oliver, 510 U.S. 266, 272 (1994) (substantive due process protects individual interests "relating to marriage, family, procreation, and the right to bodily integrity"). *See e.g.*, Lawrence v. Texas, 539 U.S. 558, 564 (2003); Loving v. Virginia, 388 U.S. 1, 12 (1967).
[67] United States v. Carolene Prod. Co., 304 U.S. 144, 153 n.4 (1938).

the fairness of the procedures used to implement them."[68] Thus, we could allege that the defendants violated substantive due process rights protected by the Constitution.

a. Finding a Liberty Interest

In order to bring a substantive due process claim, we must first show that there is a liberty interest at risk. The substantive due process guarantees of the Fifth and Fourteenth Amendments apply to people who are involuntarily committed in a state institution since they enjoy a constitutionally protected liberty interest.[69] This interest includes the right to reasonably safe conditions of confinement and the right to freedom from unreasonable restraint.[70] This liberty interest requires "the state to provide minimally adequate or reasonable training" sufficient to safeguard individual safety.[71] People involuntarily committed to a state institution also have Fourteenth Amendment rights to "adequate food, shelter, clothing, and medical care."[72] The Supreme Court has long recognized that individuals possess a fundamental right to personal autonomy, including in medical facilities.[73] The Supreme Court has also recognized a liberty interest in the right to refuse psychotropic medication, the right to be free from censorship of correspondence, and the right to privacy of one's own thoughts.[74] In the Ninth Circuit, there is a Fourteenth Amendment right to "restorative treatment," meaning "mental health treatment that gives them a realistic opportunity to be cured or improve the mental condition for which they were confined."[75] Additionally, the Ninth Circuit has found that "individuals in state custody have a constitutional right to adequate medical treatment" and the state has a similar "Fourteenth Amendment obligation toward those whom it has ordered involuntarily committed."[76] As long as our plaintiff was involuntarily committed, it would be a low bar to allege that [redacted] infringed on a protected liberty interest. Notably, a minor who is committed to [redacted] with the consent of their parents or guardian, is not considered involuntarily committed.[77] However, a child who is committed while in foster care can be considered involuntarily committed. The State Supreme Court found that the state may not "classify an admission as 'voluntary' by asserting an authority that is statutorily reserved for parents and guardians."[78] Therefore, the analysis below assumes that our plaintiff is a child in state custody who has been involuntarily committed.

Relying on these cases, we could bring a claim alleging that [redacted] is failing to provide adequate safety and personal security, freedom from bodily restraint, the right to refuse medication, or a lack of necessary training for those employed at [redacted]. There is evidence supporting several of these claims, though the safety issue is the strongest. From conversations with attorneys and activists in the state, as well

[68] Daniels v. Williams, 474 U.S. 327, 331 (1986).
[69] *Romeo*, 457 U.S. 307, 315-17 (1982) (recognizing that involuntarily committed patients enjoy affirmative rights to state care, protection, and rehabilitation); Ammons v. Wash. Dep't. of Soc. & Health Servs., 648 F.3d 1020, 1027 (9th Cir.2011) ("Involuntarily committed patients in state mental health hospitals have a Fourteenth Amendment due process right to be provided safe conditions by the hospital administrators."). *See also* Ingraham v. Wright, 430 U.S. 651, 673 (1977); Hutto v. Finney, 437 U.S. 678 (1978) (finding that the right to personal security is protected under the substantive Due Process Clause and this right remains when involuntarily confined). The Ninth Circuit has also repeatedly recognized the substantive due process right of involuntarily committed patients to safe confinement conditions. *See* Neely v. Feinstein, 50 F.3d 1502, 1507 (9th Cir. 1995); Flores by Galvez–Maldonado v. Meese, 942 F.2d 1352, 1363 (9th Cir. 1991); Estate of Conners by Meredith v. O'Connor, 846 F.2d 1205, 1207 (9th Cir. 1988).
[70] *Romeo*, 457 U.S. at 315-16, 324.
[71] *Id.* at 319.
[72] *Id.* at 315-18.
[73] Union Pac. Ry. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded . . . than the right of every individual to the possession and control of his own person, free from all restraint or interference of others."). *See also* Greenholtz v. Neb. Penal Inmates, 442 U.S. 1, 18 (1979) (finding that "[l]iberty from bodily restraint always has been recognized as the core of the liberty protected by the Due Process Clause from arbitrary governmental action").
[74] Procunier v. Martinez, 416 U.S. 396 (1974); Myers v. Alaska Psychiatric Inst., 138 P.3d 238, 244, 248 (Alaska 2006).
[75] Or. Advoc. Ctr. v. Mink, 322 F.3d 1101, 1121 (9th Cir. 2003).
[76] Sandoval v. City of San Diego, 985 F.3d 657, 667 (9th Cir. 2021); *Rawson*, 975 F.3d at 753.
[77] [Redacted].
[78] Matter of April S., 499 P.3d 1011, 1020 (2021).

as publicly available information online, there are clear concerns about the lack of safety. Former [redacted] employees described unsafe conditions at the facility, including multiple riots and regular escapes by at-risk kids. According to state news outlets, between April to September 2022, city police were called to [redacted] 80 times in response to assaults and escapes.[79] In fact, [redacted], who served as a Mental Health Specialist for three months, stated that around once a week, teachers from the city school district refused to enter [redacted] because of dangerous conditions.[80] The local news also reported several cases, including a 14-year-old and 11-year-old, who were sexually abused by other patients at [redacted].[81] The parents allege that the violence is the result of a lack of supervision and staffing shortfalls.[82] In an interview, a state psychiatrist shared that she refuses to refer children to [redacted] after a former patient was repeatedly sexually assaulted for two weeks without any staff intervention. Former staff also attested to the chronic understaffing.[83] In social media groups for former employees, they explain how [redacted] failed to hire, train and retain staff to appropriately oversee young patients with serious mental health needs. We also have a plausible argument alleging the unconstitutional use of restraints. In 2006, advocates raised issues with [redacted]'s staffing, medication, and restraint practices.[84] In 2022, [redacted] failed federal inspections due to the overuse of locked "seclusion rooms" as well as the high number of assaults.[85] Finally, there is evidence of inadequate medical care. In one case, a patient "spent 40 days in the locked facility without receiving a single therapy session."[86] In interviews with children formerly detained at [redacted], they testify to the lack of mental health services and how their experience at the facility only exacerbated their mental health struggles.[87] Overall, we likely have sufficient facts to show a violation of children's liberty interests in safety and personal security.

b. Satisfying the Professional Judgment Standard

As the Court addresses in *Romeo*, it is not sufficient to show that a liberty interest has been infringed.[88] Instead, we would also need to show that "the extent or nature of the restraint or lack of absolute safety is such as to violate due process."[89] Having recognized a constitutional right grounded in the Due Process Clause, the Supreme Court acknowledged the need "to balance 'the liberty of the individual' and 'the demands of an organized society.'"[90] The Ninth Circuit has applied and interpreted *Romeo* as requiring a balance between individual and state interests.[91] In *Romeo*, the Court adopted the professional judgment standard, in lieu of strict scrutiny, or criminal recklessness standards.[92] Under the professional judgment standard, professional administrator's actions will be held unconstitutional if they are "such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment."[93] The Court defined a "professional" decisionmaker as someone "competent, whether by education, training or experience, to make the particular decision at issue."[94] The Ninth Circuit has found that the professional judgment standard is an objective test

[79] *Id.*
[80] *Id.*
[81] [Redacted].
[82] *Id.*
[83] [Redacted].
[84] *Id.*
[85] [Redacted].
[86] [Redacted].
[87] *Id.*
[88] *Romeo*, 457 U.S. at 320.
[89] *Id.*
[90] *Id.* at 320 (quoting Poe v. Ullman, 367 U.S. 497, 542 (1961).
[91] *O'Connor*, 846 F.2d at 1208 (explaining that "[u]nder Youngberg's balancing test, the risk of harm and the burden on the state are weighed").
[92] *Romeo*, 457 U.S. at 323, 321-22, 325.
[93] *Id.* at 321-22. *See also Ammons*, 648 F.3d at 1027 (finding that "[w]hether a hospital administrator has violated a patient's constitutional rights is determined by whether the administrator's conduct diverges from that of a reasonable professional").
[94] *Romeo*, 457 U.S. at 323.

and does not require the plaintiff to show that the officials were "subjectively aware of the risk" posed to the patient.[95] This standard is "far more stringent" than an ordinary tort negligence standard.[96]

Under this professional judgment standard, we would have to show that [redacted] employees' conduct diverges from that of a reasonable professional. We could present evidence concerning the lack of care and the use of seclusion rooms as going against standard medical practices.[97] We could also present evidence concerning the pattern of violence and sexual assaults to show that the continued lack of oversight and inadequate training diverges from reasonable behavior. Finally, we could compare [redacted]'s training protocols to those of other hospitals or mental health institutions to find that they have failed professional medical judgment standards in their hiring of unqualified candidates and in their inadequate training. While there is "clearly established law that hospital officials must provide safe conditions for involuntarily committed patients… circumstances under which state hospital officials may be held responsible for failing to do so" is fact-dependent and will likely be shaped by our plaintiffs' individual experiences at [redacted].[98] However, we should be able to show that, in the face of known threats to patient safety, [redacted] employees "failed to take adequate steps in accordance with professional standards to prevent harm from occurring."[99]

3. Suing the State for the Actions of a Third Party

A final possible approach is to bring a Section 1983 claim against the state for failing in their affirmative duty to protect the substantive process rights of the children in [redacted] custody.[100] Even though it is well established that the Constitution protects a person's liberty interest in their bodily security, the Fourteenth Amendment typically "does not impose a duty on [the state] to protect individuals from third parties," including violence inflicted by a private actor.[101] It also does not guarantee certain minimal levels of safety and security.[102] Instead, "the general rule is that [a] state is not liable for its omissions" such as a failure to act to protect a life, liberty, or property interest since the Fourteenth Amendment does not "transform every tort committed by a state actor into a constitutional violation."[103] Thus, a state's failure to protect a liberty interest does not violate the Fourteenth Amendment unless one of two exceptions applies: (1) the special relationship exception, or (2) the state-created danger exception.[104] If either exception applies, a state's omission or failure to protect may give rise to a Section 1983 claim.[105]

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[95] *Ammons*, 648 F.3d at 1029.
[96] *O'Connor*, 846 F.2d at 1208.
[97] Jose A. Arriola Vigo et al., *Seclusion or Restraint: APA Resource Document,* AM. PSYCHIATRIC ASS'N (Feb. 2022), https://www.psychiatry.org/news-room/apa-blogs/apa-resource-on-seclusion-or-restraint (finding that seclusion and restraints can only be used in emergency safety situations and only when all lesser restrictive interventions have been attempted).
[98] *Ammons*, 648 F.3d at 1028.
[99] *Id.* at 1030.
[100] *See e.g.*, MARTIN A. SCHWARTZ, SECTION 1983 LITIGATION: CLAIMS AND DEFENSES § 3.09, at 1 (4th ed. 2012) ("[Section] 1983 claimants continue to file large numbers of due process duty to protect claims."). *See also* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 194 (1989) (characterizing the issue as "when, if ever, the failure of a state or local governmental entity or its agents to provide an individual with adequate protective services constitutes a violation of the individual's due process rights").
[101] *Patel*, 648 F.3d at 971 (citing *DeShaney*, 487 U.S. at 196. *See also Romeo*, 457 U.S. at 316–17.
[102] *DeShaney*, 487 U.S. at 202. *See generally* Claire Marie Hagan, *Sheltering Psychiatric Patients from the Deshaney Storm: A Proposed Analysis for Determining Affirmative Duties to Voluntary Patients*, 70 Wash. & Lee L. Rev. 725 (2013) (finding that the Constitution restricts the government from acting, but does not require the government to protect us or to provide services).
[103] Munger v. City of Glasgow Police Dep't, 227 F.3d 1082, 1086 (9th Cir.2000). *See also Patel*, 648 F.3d at 971 (finding that the Fourteenth Amendment "generally does not confer any affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests"); *DeShaney*, 489 U.S. at 196-97 (1989) ("[T]he State cannot be held liable under the [Due Process] Clause for injuries that could have been averted had it chosen to provide them."); Daniels v. Williams, 474 U.S. 327, 332 (1986) ("[The Constitution] does not purport to supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society.").
[104] Campbell v. State of Washington Dep't of Soc. & Health Servs., 671 F.3d 837, 843 (9th Cir. 2011).
[105] *Patel*, 648 F.3d at 972.

a. Special Relationship Exception

The special relationship exception applies when a state "takes a person into its custody and holds him there against his will."[106] The exception is triggered when a person experiences "incarceration, institutionalization, or other similar restraint of personal liberty."[107] The state's duty to provide constitutional protections, such as substantive due process rights, arises "not from the state's knowledge of the individual's predicament or from its expressions of intent to help him, but from the limitation which [the state] has imposed on his freedom."[108] For a minor child, state custody exists when the state has so restrained the child's liberty that the parents cannot care for the child's basic needs.[109] We are unlikely to succeed in a claim that admission to [redacted] results in state custody for the purposes of substantive due process. [Redacted] is not a state-run facility so it is not necessarily the state taking the person into custody and holding them there.[110] For example, Courts have found that this exception does not apply when a child is in private custody, such as their parents, or when they are at school since "the parents—not the state—remain the student's primary caretakers."[111] Additionally, "mere custody… will not support a 'special relationship' claim when a 'person voluntarily resides in a state facility under its custodial rules.'"[112] Since some of the children are voluntarily committed to [redacted] under their parent's consent, they do not fit within this exception.

Another possible approach to finding a special relationship concerns the children in state custody since "it is . . . clearly established that this special relationship doctrine applies to children in foster care."[113] "[O]nce the state assumes wardship of a child, the state owes the child, as part of that person's protected liberty interest, reasonable safety and minimally adequate care and treatment appropriate to the age and circumstances of the child."[114] This liberty interest includes "protection from harm inflicted by a foster parent."[115] The proper standard for determining whether a foster child's due process rights have been violated is "deliberate indifference," which "requires (1) a showing of an objectively substantial risk of harm; and (2) a showing that the officials were subjectively aware of facts from which an inference could be drawn that a substantial risk of serious harm existed and (a) the official actually drew that inference or (b) that a reasonable official would have been compelled to draw that inference."[116] We could argue that, since the state had a custodial relationship with foster children, they failed to provide adequate safety and medical care when they affirmatively endangered some of the children by putting them at [redacted], which was known to be dangerous. Overall, we might have enough evidence to show there was a special relationship, but it may be difficult to show deliberate indifference sufficient to find liability.

b. State-created Danger Exception

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[106] *DeShaney*, 489 U.S. at 199–200.
[107] *Id.* at 200.
[108] *Id. See also Patel*, 648 F.3d at 972 ("In other words, the person's substantive due process rights are triggered when the state restrains his liberty, not when he suffers harm caused by the actions of third parties.").
[109] *DeShaney*, 489 U.S. at 199-201.
[110] *Id.* at 199–200.
[111] *DeShaney*, 489 U.S. at 201; *Patel*, 648 F.3d at 973.
[112] *Campbell*, 671 F.3d at 843 (citing Walton v. Alexander, 44 F.3d 1297, 1305 (5th Cir. 1995)).
[113] Henry A. v. Willden, 678 F.3d 991, 1000 (9th Cir. 2012). *See also DeShaney*, 489 U.S. at 201 n.9 (implying that if the plaintiff had been placed in foster care, the Court may have ruled differently and found a special relationship).
[114] Lipscomb v. Simmons, 962 F.2d 1374, 1379 (9th Cir. 1992). *See also* Tamas v. Dep't of Soc. & Health Servs., 630 F.3d 833, 846–47 (9th Cir. 2010) (finding that foster children retain "a federal constitutional right to state protection" while they remain in the care of the State).
[115] *Tamas*, 630 F.3d at 842.
[116] *Id.* at 844-845.

The state can also be held liable under the Fourteenth Amendment's Due Process Clause for failing to protect an individual from harm by third parties under the "state-created danger exception." This applies only where there is "affirmative conduct on the part of the state in placing the plaintiff in danger," that they would not have faced otherwise and "where the state acts with 'deliberate indifference' to a 'known or obvious danger.'"[117] "Deliberate indifference is 'a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action."[118] To satisfy the culpable mental state, the state actor must "recognize [an] unreasonable risk and actually intend to expose the plaintiff to such risks without regard to the consequences to the plaintiff."[119] The Ninth Circuit held that a claim could proceed against a state actor for sending a child to an "out-of-state facility that had a known history of chronic neglect and abuse."[120] In that case, the plaintiff claimed that the state acted with deliberate indifference to known or obvious danger by removing the children from their homes and placing them in the care of foster parents, including in the care of out-of-state facilities, that were unfit to care for them and posed an imminent risk of harm to plaintiffs' safety.[121] In another case, the Ninth Circuit found that a state's approval of a foster care placement, despite reports of suspected abuse, created a danger of abuse that the foster child would not otherwise have faced.[122] From this case law, we could likely bring a claim where foster children allege that the state officials knew of the danger of abuse at [redacted] and acted with deliberate indifference by placing them there anyway. There is likely enough evidence to support a Section 1983 due process claim against the state officials under the state-created danger doctrine.

There is evidence that the state should have been aware of the dangers of sending foster care children to [redacted]. Federal, state and nonprofit regulators have regularly found problems with the facility. Federal investigators with the Centers for Medicare and Medicaid Services documented problems at the hospital, including "immediate jeopardy" situations that put the health and safety of patients at risk.[123] The State Division of Behavioral Health reported concerns from staff regarding understaffing, documented incomplete and conflicting medical notes, and urged [redacted] to "hire additional staff to ensure services are being rendered safely and with quality of care."[124] The state found that it would be "of the utmost importance" for the hospital to hire, train, and retain more workers.[125] Finally, the nonprofit safety and quality accrediting organization the Joint Commission handed down a "preliminary denial of accreditation" to [redacted] citing conditions that posed a "threat to patients."[126] The Commission named 12 different areas where inspectors found "performance issues" at [redacted], including that "the patient has the right to be free from neglect; exploitation; and verbal, mental, physical, and sexual abuse" and "the hospital provides care, treatment, services, and an environment that pose no risk of an 'Immediate Threat to Health or Safety.'"[127] This evidence could be sufficient to claim that the state exhibited deliberate indifference and violated the children's rights to "receive adequate medical care, monitor the administration of medication, or respond to reports of abuse."[128] The question concerning deliberate indifference is fact-specific, dependent on the circumstances of our plaintiffs and how much the state employees were aware of what the foster care children might face at [redacted].

4. Remedies and Statute of Limitations

[117] *Patel*, 648 F.3d at 974 (quoting *Munger*, 227 F.3d at 1086). *See also* L.W. v. Grubbs, 92 F.3d 894, 900 (9th Cir. 1996).
[118] *Id.* (quoting Bd. of Cnty. Cmm'rs v. Brown, 520 U.S. 397, 410 (1997)).
[119] *Grubbs*, 92 F.3d at 899.
[120] *Henry A.*, 678 F.3d at 1002.
[121] *Id.*
[122] *Tamas*, 630 F.3d at 843–44.
[123] [Redacted].
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Henry A.*, 678 F.3d at 1001.

Under Section 1983, plaintiffs can seek injunctive relief and damages. In similar litigation, a district court entered a permanent injunction that enjoined four practices at a private psychiatric residential treatment center, including prohibiting the defendants from: "(1) opening, reading, monitoring or censoring the boys' mail; (2) administering polygraph examinations for any purpose whatsoever; (3) placing boys in isolation facilities for any reason other than to contain a boy who is physically violent; and (4) using physical force for any purpose other than to restrain a juvenile who is either physically violent and immediately dangerous to himself or others, or physically resisting institutional rules."[129] Plaintiffs may also recover compensatory damages, including for physical pain and suffering, as well as emotional distress.[130] The Supreme Court found that compensatory damages for a constitutional violation under Section 1983 must be based on proof of the actual injuries suffered by the plaintiff.[131] When a Section 1983 plaintiff suffers a violation of constitutional rights, but no actual injuries, they are entitled to an award of only $1 in nominal damages.[132] A Section 1983 plaintiff may recover punitive damages against an official in their personal capacity if the official acted with malicious or evil intent or in callous disregard of the plaintiff's federally protected rights.[133] Punitive damages may be awarded even when the plaintiff recovers only nominal damages.[134] Finally, courts can award reasonable attorneys' fees to the prevailing party in a Section 1983 action.[135]

Finally, there is no federal statute of limitations for Section 1983 claims.[136] When federal law is silent on an issue in a federal Section 1983 action, 42 U.S .C. § 1988(a) requires federal courts to borrow a state's limitations period.[137] In Wilson v. Garcia, the Supreme Court held that the federal court should borrow the state's limitations period for personal injury actions.[138] In the state, this period is two years.[139]

III. Conclusion

As the memo above demonstrates, all potential legal claims will necessitate additional fact gathering. Based on our legal analysis, we believe that the Medicaid, ADA/Rehab, and the False Claims Act present the strongest claims, dependent on facts. Substantive due process is viable but requires finding state action.

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[129] *Milonas*, 691 F.2d at 940.
[130] *Carey*, 435 U.S. at 267; *Stachura*, 453 U.S. at 308 n.11.
[131] *Id.*
[132] *Id.*
[133] Smith v. Wade, 461 U.S. 30 (1983).
[134] *See, e.g.*, Cortes-Reyes v. Salas-Quintana, 608 F.3d 41, 53 (1st Cir. 2010) (finding "jury may properly award punitive damages even if it awards no nominal or compensatory damages").
[135] Maine v. Thiboutot, 448 U.S. 1, 11 (1980). *See also* Hudson v. Michigan, 547 U.S. 586, 597 (2006) ("Since some civil-rights violations would yield damages too small to justify the expense of litigation, Congress has authorized attorney's fees for civil-rights plaintiffs.").
[136] MARTIN A. SCHWARTZ & KATHRYN R. URBONY, FED. JUDICIAL CTR., SECTION 1983 LITIGATION 5 (3d ed. 2008).
[137] *Id.*
[138] Wilson v. Garcia, 471 U.S. 261 (1985).
[139] [Redacted].

Applicant Details

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Applicant Education

BA/BS From	**University of Dayton**
Date of BA/BS	**May 2020**
JD/LLB From	**Fordham University School of Law** **https://www.fordham.edu/info/29081/center_for_judicial_engagement_and_clerkships**
Date of JD/LLB	**May 22, 2023**
Class Rank	**Below 50%**
Law Review/ Journal	**Yes**
Journal(s)	**Fordham Journal of Corporate & Financial Law**
Moot Court Experience	**No**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations	**Just the Beginning Organization**

Recommenders

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

Jamel Gross-Cassel
203 West 85th Street Apt. 56
New York, NY 10024

June 13, 2023

The Honorable Jamar K. Walker
United States District Court
for the Eastern District of Virginia
600 Granby Street
Norfolk, VA 23510-1915

Re: Clerkship Application of Jamel Gross-Cassel

Dear Judge Walker:

I am a 2023 graduate of Fordham University School of Law, where I served as the Editor-in-Chief of the *Fordham Journal of Corporate & Financial Law* and was awarded the Parchomovsky-Siegelman Student Graduation Prize for publishing the best work of scholarship. I am applying for a clerkship in your Chambers for the 2024-2025 term and am flexible as to a starting date.

Leading a law journal, writing a Note, and learning from some of the best litigators in the country are all things I could never have imagined when I was homeless and estranged from my parents a few years ago. Becoming a law clerk is the next step in continuing such an unimaginable trajectory and establishing myself as a capable and eager-to-grow legal mind.

My long-term goal is to be an attorney at the Federal Defenders of New York. My internship at the Federal Defenders in Fall 2022 ignited a passion for helping people who are charged with federal crimes and cannot afford to hire an attorney. My own hardships, before and during law school, allowed me to form relationships with my clients and relate to them in an authentic way. Recognizing myself in some of them also enriched my perspective on the law and now I want to refine my skills as a clerk in your chambers.

Like many law students who lack proper mentors, family support, and financial wherewithal, the first year of law school challenged me and required painful adjustments. Fortunately, a paid internship mitigated my financial hardships and allowed me to focus solely on law school. Since then, I maintained a 3.47 GPA while spending each semester in a litigation-focused internship. My Note, "The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2," and my editorial position demonstrate my growth as a legal writer. I have also competed in multiple trial advocacy competitions and learned from extraordinary practitioners during my internships with the Federal Defenders and Kaplan Hecker & Fink.

Attached, please find my resume, unofficial law school transcript, and writing samples. Letters of recommendation from Caroline M. Gentile (cgentile@law.fordham.edu), Michael W. Martin (mwmartin@fordham.edu), and Nicholas W. Haddad (haddadnw@gmail.com) will be sent under separate cover. I greatly appreciate your kind consideration.

Sincerely,

Jamel Gross-Cassel

Enclosures

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EDUCATION:

Fordham University School of Law, New York, NY
Juris Doctor, May 2023

Honors/ Activities: Editor-in-Chief, Journal of Corporate & Financial Law
Parchomovsky-Siegelman Student Graduation Prize (best work of scholarship published in one of Fordham Law School's journals)
Archibald R. Murray Public Service Award
Brendan Moore Trial Advocacy Team
Black Law Students Association (Student of the year 2022-23)

Publications: Jamel Gross-Cassel, Note, *The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2*, 28 FORDHAM J. CORP. & FIN. L. 439 (2023).

University of Dayton, Dayton, OH
Bachelor of Arts, Political Science, May 2020
Honors: Mock Trial Team (Competitor, Indy Mock Hundred 2019 – Outstanding Attorney)

EXPERIENCE:

Hon. George B. Daniels, U.S. District Court for the S.D.N.Y. New York, NY
Legal Extern Spring 2023

- Assisted with drafting opinions and decisions on matters including compassionate release, fraudulent conveyance, deliberate indifference, and attorney's fees, in addition to attending various court proceedings.

The Federal Defenders of New York (S.D.N.Y.) New York, NY
Legal Extern Fall 2022

- Conducted legal research and drafted memoranda on issues including wire fraud, narcotics importation conspiracy, possession of a weapon, and fourth amendment rights.
- Assisted attorneys with arraignments, client interviews, client counseling, discovery, and preparation for bail arguments.

Smith Gambrell & Russell LLP New York, NY
***Summer Associate* (permanent offer accepted)** Summer 2022

- Drafted documents including a motion in response to an objection of a Magistrate Judge's ruling on discovery and attended depositions on the matter.
- Conducted research and drafted subsequent memoranda on topics including class-action standing, data breaches, quantum meruit, and landlord-tenant law.

Kaplan Hecker & Fink LLP New York, NY
Legal Intern September 2021 – April 2022

- Conducted review of documents pursuant to discovery requests to ascertain necessity for responsiveness and characterization of privileged and drafted responses to subpoenas.
- Assisted with criminal and pro bono matters including client intake, research, and drafting memoranda on topics such as illegal search and seizure and harsh and excessive sentencing.

Lincoln Square Legal Services, Inc. New York, NY
Federal Litigation Clinic Research Assistant Summer 2021

- Assisted, as a team member, with preparation of court proceedings including legal research, drafting court filings, and categorizing evidence.

Advocates for Basic Legal Equality, Inc. Dayton, OH
Intern Fall 2019

- Assisted at a non-profit regional law firm that provides legal assistance in civil matters to help low-income individuals and groups in Ohio.

INTERESTS: Running, Chess, Dayton Basketball, and the Philadelphia Eagles.

Jamel Gross-Cassel
Fordham University School of Law
Cumulative G.P.A.: 3.152

Fall 2020:

Course Name	Instructor	Grade	Credit Units	Comments
Criminal Law	John Pfaff	B-	3	
Civil Procedure	Pamela Bookman	B-	5	
Legal Writing/Research	Nicholas Haddad	IP	2	
Legal Process and Quantitative Methods	Various	P	1	
Torts	Courtney Cox	B-	4	

Fall 2020 G.P.A.: 2.667

Spring 2021:

Course Name	Instructor	Grade	Credit Units	Comments
Contracts	Steven Thel	B	4	
Constitutional Law	Martin Flaherty	B-	4	
Legal Writing and Research	Nicholas Haddad	B	3	
Legislation and Regulation	Clare Huntington	B	4	
Property	Zephyr Teachout	B-	4	

Spring 2021 G.P.A.: 2.860

Fall 2021:

Course Name	Instructor	Grade	Credit Units	Comments
Employment Discrimination	Lisa Teich	A-	3	
Organized Crime	Eric Seidel	B+	2	
Alternative Dispute Resolution	Jacqueline NolanHaley	B+	2	
Fundamental lawyering Skills	Anna Clark	A-	3	
Professional Responsibility	James Andrew Kent	B	3	

Fall 2021 G.P.A.: 3.410

Jamel Gross-Cassel
Fordham University School of Law
Cumulative G.P.A.: 3.152

Spring 2022:

Course Name	Instructor	Grade	Credit Units	Comments
Corporations	Caroline Gentile	B+	4	
E-Law in the Global Setting	Kenneth Rashbaum	A	2	
Regulation of Financial Institutions	Steven Thel	B+	3	
Negotiations	Deborah Shapiro	B+	2	
Trial Competition Teams	N/A	P	3	

Spring 2022 G.P.A.: 3.454

Fall 2022

Course Name	Instructor	Grade	Credit Units	Comments
How Judges Decide	Joel Cohen, Richard Emery, Dale Degenshein	A-	2	
Peer Mentoring and Leadership	Jordana Confino	B+	2	
Externship Seminar	Nicole Lodge	A-	1	
Externship Fieldwork	N/A	P	3	Federal Defenders of New York (SDNY)

Fall 2022 G.P.A.: 3.533

Spring 2023:

Course Name	Instructor	Grade	Credit Units	Comments
Evidence	Bennett Capers	B+	4	
Advanced Legal Writing	Arnold Cohen	A-	3	
Externship Seminar	Hon. Sherry Klein Heitler (Ret.)	A-	1	
Externship Fieldwork	N/A	P	3	Judicial extern to the Hon. George B. Daniels

Spring 2023 G.P.A.: 3.50

FORDHAM UNIVERSITY SCHOOL OF LAW
EXPLANATION OF TRANSCRIPT

Grade Scale for the Juris Doctor (J.D.)

Effective Fall 2014		Prior to Fall 2014	
Grade	**Quality Points**	**Grade**	**Quality Points**
A+	4.333	A+	4.30
A	4.000	A	4.00
A-	3.667	A-	3.70
B+	3.333	B+	3.30
B	3.000	B	3.00
B-	2.667	B-	2.70
C+	2.333	C+	2.30
C	2.000	C	2.00
C-	1.667	C-	1.70
D	1.000	D	1.00
F	0.000	F	0.00
P	Not in GPA	P	Not in GPA
S	Not in GPA	S	Not in GPA

Class Ranking - The Law School does not calculate class rankings.

Transfer Credit - Transfer credit (ex. TA, TB, etc.) represents work applicable to the current curriculum and must be a minimum of a "C" grade to be accepted. Transfer credit is not included in the weighted grade point average.

Repeating Courses - Only a course with a failed grade may be repeated. Failed required courses must be repeated. Failed elective courses may be repeated, however this is not required. If repeated, the quality points of the new grade will be half in value (ex. F/A would be 2.00 quality points). The original failing grade remains on the transcript.

Grade Scale for Master of Laws (LL.M.) and Master of Studies in Law (M.S.L.)

Effective Fall 2017	
Grade	**Quality Points**
H+	4.2
H	4.0
H-	3.8
VG+	3.6
VG	3.4
VG-	3.2
G+	3.0
G	2.8
G-	2.6
P+	2.4
P	2.2
P-	2.0
F	0.0

Prior to Fall 2017	
Grade	**Description**
H (Honors)	Outstanding performance
VG (Very Good)	Excellent performance
G (Good)	Above average performance
P (Pass)	Performance worthy of credit
F (Fail)	Inferior performance that does not satisfy the minimum standard for course credit

Effective Fall 2014 within each grade level (H, VG, G, P), students may be awarded a plus (+) or minus (-) to distinguish performance on the high end or the low end within the grade level.

Grade Scale for Legal Writing and Introduction to U.S. Legal System Courses

(These grades are not factored into honors determinations)

Students Admitted Prior to Fall 2017

Grade	Description
HP (High Pass)	Outstanding
PA (Pass)	Good or Acceptable
LP (Low Pass)	Passing, but deficient performance
FA (Fail)	Performance unworthy of credit

Students Admitted Prior to Fall 2011

Grade	Description
H (Honors)	Outstanding
CR (Credit)	Good or Acceptable
F (Fail)	Performance unworthy of credit

Grade Scale for Doctor of Juridical Science (S.J.D.)

Grade	Description
CR	Credit
NR	No Credit

Administrative Grades that May be Used in J.D., LL.M., and M.S.L Programs

AUD (Auditing)
CR (Credit)
INC (Incomplete)
IP (In Progress: year long course, final grade assigned in succeeding term)
NC (No Credit)
NGR (No Grade Received)
S (Satisfactory)
U (Unsatisfactory)
W (Withdrew)

Student education records on reserve are maintained in accordance with Public Law 93-380, sec 438, "The Family Education Rights & Privacy Act" (FERPA).The policy of Fordham University pertinent to this legislation is available from the Registrar upon request.

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am grateful to have the opportunity to write on behalf of Jamel Gross-Cassel for a judicial clerkship. Like few have, Jamel inspires me. It was miraculous that Jamel found his way to the University of Dayton in the late summer of 2016 at a time when he was homeless, abandoned by family, and on a razor's edge of becoming another statistic. Seven years later, on the verge of graduating from Fordham Law School as the Editor-in-Chief of its Journal of Corporate and Financial Law, a member of the Trial Advocacy Team, and with an offer from Smith Gambrell & Russell, Jamel's journey is the American Dream. Jamel is an obviously bright and exceptional student. To meet him is to experience a quiet strength and deep belief that he will exceed expectations by sheer will and work ethic. Jamel is truly one of a kind and would be a wonderful addition to your Chambers.

As one of my three legal interns in the summer of 2021, Jamel helped to manage the Fed Lit Clinic's caseload, which typically is handled by 12-14 students during the school year. The caseload consisted of federal criminal defense cases with an array of federal civil matters, such as prisoner civil rights, police misconduct, and employment discrimination matters. Jamel worked on an array of tasks, including drafting emails to prosecutors, letters to the Court, conducting legal research, reviewing discovery in the civil matters, and counseling clients, most of whom were incarcerated. He helped to decipher difficult factual records, researched touch questions of law, and assisted in the counseling of clients on their matters. The cases exposed him to the nuances of federal discovery, plea bargaining, sentencing, critical constitutional and federal court issues, and complex counseling involving life-changing consequences. He handled all of these tasks deftly.

Jamel's success as a research assistant was founded on skills essential for clerking. He was an active, critical thinker whose comments were often insightful and reflected scholarly ambition. He worked hard and efficiently with great focus, while exhibiting sound judgment throughout his time with me. He wrote clearly and concisely, and his writing proficiency has only grown since his time with me. He was a pleasure to supervise.

Most importantly, Jamel is friendly, engaging and compassionate. He lifts every room he enters with a positive energy few have. Hardworking, he worked 20 hours per week through undergrad, reflecting his discipline. He is a reliable and valued colleague, as last year's Journal editors discovered when they voted him to be this year's Editor-in-Chief. He has met the rigors of a top law graduate program, excelling under trying conditions and still maintaining his wonderful and humble demeanor. I expect that he will similarly flourish as your law clerk, and thus recommend him to you without reservation. I welcome any further inquiry that you may have regarding him.

Sincerely,

Michael W. Martin
Associate Dean for Experiential Learning,
Director of Clinical Programs, and
Clinical Professor of Law

Michael Martin - mwmartin@fordham.edu

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write in enthusiastic support of Jamel Gross-Cassel's application to serve as your law clerk.

It was my great fortune to have Jamel as a student in my first-year legal writing class at Fordham. During my ten years of teaching, I have never written a letter in support of a student who, like Jamel, received a B in my class. But I also have never had a student as extraordinary as Jamel. Jamel possesses a wonderful and rare combination of keen intelligence, maturity, humility, and exceedingly good judgment. I recommend him without reservation.

Beginning with our first class, Jamel consistently demonstrated an unerring sense of what clerking requires—an impressive ability to spot issues, to cut through the thicket, and to analyze issues with precision. His prose is crisp, direct, and engaging, and it has been a joy to watch him refine his writing over time. Jamel's writing samples (including his forthcoming Note) are a testament to his dedication and focus on honing his craft.

In class, Jamel enriched our discussions with searching comments and questions, often playing a pivotal role in driving class discussion—a particularly impressive feat given that I conducted our class virtually that year. He also is a superb speaker. During oral argument, he demonstrated tremendous poise, answering questions clearly and directly. It therefore was hardly surprising that Jamel went on to be an accomplished member of the Brendan Moore Trial Advocacy Team and Editor-in-Chief of the Fordham Journal of Corporate & Financial Law.

And more, Jamel truly distinguished himself from his peers by taking a genuine interest in the subjects about which he wrote. Although the course material consisted of hypotheticals, Jamel never approached the problems as "assignments." Instead, he owned his work by mastering the underlying facts and presenting a just legal result under the provided circumstances.

Aside from his stellar writing and analytical skills, Jamel is a team player extraordinaire. Among the young professionals with whom I have worked, Jamel not only stands out as one of the brightest, but also for his integrity and judgment, eagerness to solve even the most challenging problems, and respect for those around him.

At the beginning of his 1L year, Jamel wrote me a short message, asking that he not be defined by his past experiences, but instead by his abilities. I am not alone is recognizing how extraordinary those abilities are—as demonstrated by his impressive roster of roles with Judge Daniels, the Federal Defenders, and top firms. I hope that roster will soon expand to include a judicial clerkship.

As a former Court of Appeals and District Court law clerk, I know how much chambers needs a steadfast, efficient, and talented team. I have no doubt that Jamel will be an outstanding law clerk—insightful, productive, a team-player, and a joy to have in your Chambers.

I would love to speak with you more about Jamel. Please do not hesitate to contact me at (917) 755-0087.

Respectfully yours,

Nicholas W. Haddad

Fordham University School of Law
150 West 62nd Street
New York, NY 10023

June 13, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am delighted to recommend Jamel Gross-Cassel to serve as a law clerk in your chambers. He is among the most diligent, and the most disciplined, students I have had the privilege to teach in the twenty years I have been a member of the faculty at the Fordham University School of Law. He is also much more willing, and able, to learn from constructive criticism than not only most students I have taught but also most academicians and practitioners with whom I have worked. As a result, despite being a first-generation student estranged from his family for many years, during his time at Fordham's Law School, Jamel has become an outstanding student, a (soon-to-be) published author, and a leader among his peers. At the same time, he has gained valuable practical experience through internships at the litigation boutique Kaplan Hecker & Fink LLP, the Federal Defenders of New York, and the Honorable George B. Daniels of the United States District Court for the Southern District of New York. In the Fall of 2023, he will join Smith, Gambrell & Russell, LLP as a litigation associate.

Almost immediately upon gaining admission to the Fordham Journal of Corporate & Financial Law in July of 2021 (after his first year of law school), Jamel contacted me (even though we had never met), because I am one of the journal's co-moderators and he was interested in writing a student note. I advised him (as I do all rising second-year students) to wait until he had taken Corporations so that he would have a sufficient background in business law to be able to choose a topic that truly interests him. Although he was clearly disappointed to delay his plans, he agreed my advice was sound.

Six months later, I was surprised as I walked into the classroom on the first day of classes for the Spring 2022 Semester (the second semester of his second year of law school), to see Jamel already sitting in the second row of seats, because the seats in the first few rows tend to be the last ones to be taken. At the end of the class meeting, I was stunned when Jamel approached me, reminded me of our earlier conversation, and told me that he was very excited to take Corporations so he could both learn about business law and identify a topic for his student note, because many students are unwilling to undertake the work necessary to write a note in their third year of law school.

With more than one hundred students, our class in Corporations was quite large. The considerable size of the class always tends to diminish students' willingness to participate in classroom discussions. In addition, I have found that, having begun their legal studies in virtual classrooms due to the coronavirus pandemic, students in Jamel's cohort are notably more reluctant to volunteer answers to questions than students who entered law school with classes taught in the building (both those in cohorts beginning their studies before the pandemic and those in the cohort beginning their studies after it). Jamel was not only always prepared for our class meetings, he was also one of only a handful of students who frequently volunteered to participate in our classroom discussions. His contributions reflected an understanding of the cases and doctrines (and statutes) we explored as well as an ability to grasp the underlying (and generally unstated) rationale for the actions taken by participants in transactions and the decisions made by judges in courtrooms.

Approximately six weeks into the semester, Jamel asked me to recommend ways for him to ensure that he was studying the course material effectively. I advised him (as I do all my students) to use the examinations I have previously given in Corporations (all of which I make available to students on a course web page) as practice problems. As they are all essay exams, I also told him (as I do all my students) that I would be happy to discuss his answers to the questions on the old exams. Finally, I encouraged him (as I do all my students) to begin this work during the semester, rather than waiting until the examination period. In all the years I have been teaching, Jamel is the first student who has asked to meet with me to discuss answers to questions on old exams before the end of the semester. At his request, we met during both Spring Break (once at the beginning of it and once at the end of it) and Easter Break as well as several times while classes were in session. For each of these meetings, Jamel prepared detailed outlines to several questions on the old exams, and during all of them he asked thoughtful questions about the gaps I identified in his understanding of the cases and doctrines (and statutes) we had covered without becoming dismayed by his mistakes or discouraged from continuing to improve his understanding of the course material.

Immediately after grades for Corporations were made available to the students enrolled in the course in June of 2022, Jamel sent me an email message identifying three possible topics for his student note, because, although the independent study project through which he would receive academic credit for work on his note would not begin until August of 2022 (at the start of his third year of law school), he wanted to begin his research before classes resumed (and while he was working as a summer associate at Smith, Gambrell & Russell, LLP). In response, I described the advantages and disadvantages of each of the topics he was considering. I was excited when he chose the most ambitious of them; whether shadow trading – when an insider uses material nonpublic information about the insider's company to trade in the shares of another company (for example, a competitor) – should be banned as a species of insider trading.

Caroline Gentile - CGENTILE@law.fordham.edu

As I had by this time come to expect from him, when we met at the start of the Fall 2022 Semester to discuss his student note, Jamel had already completed a substantial amount of research. More importantly, he had already grasped that, were shadow trading to be included within the prohibitions against insider trading, the most promising avenues for inclusion were an extension of misappropriation theory (as adopted by the Supreme Court in United States v. O'Hagan) or an amendment of Rule 10b5-2 (under the Securities Exchange Act of 1934), rather than an application of classical theory (as adopted by the Supreme Court in Chiarella v. United States). At the end of this meeting, I offered (as I do for every student whose independent study project I supervise) to meet with him once each week. In all the years I have been teaching, Jamel is the only student who did not cancel (or ask to reschedule) a single meeting. Moreover, the day before each of our weekly meetings he provided me with a document evincing the work he had said he would accomplish during that week – for example, a summary of the research he had conducted, an outline of his note, a detailed outline of the particular part of the note he planned to draft, or a draft of part of the note. And, during each of these meetings, he had both a series of thoughtful questions for me and suggestions for the tasks to be undertaken in the coming week.
Unlike many students who begin their notes with the conclusion in mind and so evaluate every case, statute, regulation, and secondary source they read as part of their research in terms of whether it supports their recommendation, Jamel viewed his note as an opportunity to understand, and to offer suggestions for improving, insider trading law. Consequently, unlike many students who conclude their notes by endorsing an argument they encountered in their research, Jamel offers a novel, and pragmatic, amendment to Rule 10b5-2 that captures (only) instances of shadow trading that fall within the rule's stated reasons for prohibiting insider trading; protecting investors and the fairness and integrity of the securities markets against improper trading on the basis of inside information. To test the implications, and likely success, of his proposal, Jamel develops three scenarios involving shadow trading to which he first applies the existing prohibitions against insider trading and then applies his proposed amendment to Rule 10b5-2.

Jamel's note, which is entitled The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2, is thoroughly researched, skillfully argued, and clearly written. It has been accepted for publication in the Fordham Journal of Corporate & Financial Law, which is ranked among the top ten specialty journals for business, corporations, and securities law and among the top five journals for banking, finance, and insurance law. As a further testament to his outstanding work, I plan to nominate Jamel's note for the Parchomovsky-Siegelman Student Graduation Prize, which is awarded to a member of the graduating class who produced the best work of scholarship published in one of our student-edited journals or reviews.

In addition to his academic pursuits (and his internships), Jamel is the Editor-in-Chief of the Fordham Journal of Corporate & Financial Law (for which I serve as one of the co-moderators0. He is the first Black person to serve in this role since the journal's founding in 1996 (nearly thirty years ago). Throughout his tenure, he has worked closely with the other members of the Editorial Board to ensure the journal's continued success by selecting for publication important articles, essays, notes, and comments on interesting topics, organizing a symposium dedicated to antitrust concerns about big tech, and amending its foundational documents to clarify the responsibilities assigned to several board positions. I have been especially impressed with his skill in managing challenging situations with an authors, in guiding fellow board members through difficult conversations, and in encouraging staffers (second-year students) to become involved in, and to feel comfortable participating in, the activities the journal sponsors.

In summary, I have had an opportunity to evaluate Jamel in a variety of settings. I am confident that his exceptional drive, his capacity for legal analysis, and his extraordinary leadership skills will allow him to contribute to, and to succeed in, your chambers. Moreover, I expect that you will, as I have, very much enjoy working with, and mentoring, him.

Please phone me (or send me an email message) if you have any questions or if you require any additional information. I look forward to speaking with you.

Thank you very much for your attention.

Very truly yours,

Caroline M. Gentile

Caroline Gentile - CGENTILE@law.fordham.edu

Jamel Gross-Cassel
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WRITING SAMPLE:

Attached is an excerpt from my Note, The Solution to Shadow Trading Is Not Found in Current Insider Trading Law: A Proposed Amendment to Rule 10b5-2, in the *Fordham Journal of Corporate & Financial Law*. I have removed the title page, introduction, and background section for brevity.

The Note focuses on the novel "shadow trading" theory currently litigated in *SEC v. Panuwat*. Shadow trading occurs when a corporate insider trades on material, nonpublic information by buying a competitor or closely related company's stock. The unique and novel element of shadow trading is the lack of fiduciary duty to shareholders and the involvement of a third part company. In a shadow trade, the securities purchased are not that of the company for which the corporate insider works or the company typically completing a deal with the insider's company.

The included sections of the Note focus on three things. First, the reader is given examples of shadow trades that regularly occur. These examples are then applied to the current theories of insider trading law to demonstrate how shadow trading is not yet illegal. Second, the Note then highlights why a rule change is needed to prohibit shadow trading and proposes the exact amendment to Rule 10b5-2. Last, the amended rule is applied to the same scenarios mentioned earlier to demonstrate how the amendment effectively prohibits shadow trading.

For background on *SEC v. Panuwat*, Panuwat was a senior director of business development during his time at Medivation. While in that position, Panuwat received an email from the CEO of Medivation informing him that an acquisition of Medivation by Pfizer was imminent pending final details. The SEC alleged that Panuwat was informed through his work with investment bankers that Incyte, another biopharmaceutical company, was similar to Medivation. Having never traded Incyte stock before, Panuwat purchased 578 Incyte call options at prices of $80, $82.50, and $85 per share within minutes of receiving the email of the looming acquisition. Several days after purchasing the options, Medivation publicly announced that Pfizer would acquire them. As a result of the announcement, and the similarity of Medivation and Incyte, the following Monday, Incyte's stock reached a high of $84.39 and closed around eight percent higher than its closing price the previous Friday. The spike in Incyte's stock price earned Panuwat $107,066 in profit on the options he purchased.

inherits a loss or misses out on a gain they could not have foreseen.[85] This "informational advantage that the public is unable lawfully to overcome or offset" is what securities laws seek to preclude.[86] It follows logically that an investor who misjudges the market may try again, but an investor who finds out they were on the wrong end of an insider trade will withdraw from the market to avoid being a repeat victim.

Insider trading harms not only individual victims, but also the broader securities market.[87] Therefore, the reasoning for regulating insider trading is often rooted in the protection of the market. The Supreme Court stated that common law doctrines against insider trading were designed to protect the integrity of the securities market.[88] Without these protections, the public would be discouraged from trading in the securities market.[89] If the public still trades, the integrity of prices becomes an issue and a justification for insider trading regulations.[90] For example, one theory is that if the public thinks they are trading with someone with insider information, they will demand a premium on any trade due to a market overrun with insider trading.[91] Thus, the prices of securities would not reflect their value or all available information as intended.

II. ANALYZING HOW SHADOW TRADERS ESCAPE LIABILITY UNDER CURRENT LAW

The issue this Note seeks to remedy is how shadow trading, through a loophole, evades the existing law prohibiting insider trading. Much like in *Chiarella*,[92] the lack of a fiduciary relationship to shareholders in shadow trading frees a trader from the duty to disclose. For example, this

85. *Id.*

86. Victor Brudney, *Insiders, Outsiders, and Informational Advantages Under the Federal Securities Laws*, 93 HARV. L. REV. 322, 360 (1979).

87. *See* Michael A. Perino, *The Lost History of Insider Trading*, 2019 U. ILL. L. REV. 951, 953–54 (2019).

88. United States v. O'Hagan, 521 U.S. 642, 653 (1997).

89. *See id.* at 658.

90. *See* Steve Thel, *The Original Conception of Section 10(b) of the Securities Exchange Act*, 42 STAN. L. REV. 385, 392 (1990) (arguing the fundamental purpose of the Securities Exchange Act is to protect the public interest in the integrity of the prices of securities and a plain reading of Section 10(b) gives the SEC authority to regulate any practice that defeats it).

91. Alexandre Padilla, *Should the Government Regulate Insider Trading?*, 22 J. LIBERTARIAN STUD. 379, 382-83 (2011).

92. *See generally* Chiarella v. United States, 445 U.S. 222 (1980).

loophole in the law would also be present in instances where an insider purchases stock in their company's supplier before a new product announcement, knowing that the supplier's stock will increase after the announcement has been made. While the insider would owe a duty to disclose to their own company, they would not owe a duty to the supplier, and yet they are left with material, nonpublic information of extreme value far before the public would have a chance to benefit.

In *Panuwat*, a key piece of information in the SEC's allegations and pursuit of shadow trading is that Panuwat signed a company policy prohibiting him from using material, nonpublic information learned through his job to trade Medivation securities "or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company."[93] This policy established the duty to the source of the information required under the misappropriation theory.[94] Because Panuwat signed the policy, he opened the door for the SEC to argue that he owed the duty to the source of the information—Medivation—not to trade on the nonpublic imminent acquisition of Medivation. This Part addresses the current theory of shadow trading, additional factors and circumstances not considered by current case law, and the inability to prohibit shadow trading with insider trading law. Consider the following hypothetical scenarios of shadow trading.[95]

A. INSTANCES OF SHADOW TRADING

1. Scenario One: Supplier

Company A is a company that produces vaccines for deadly viruses. Suppose that an executive at Company A, due to their position, receives an email from the CEO that a breakthrough has been made on a vaccine that has been deemed safe for human use and millions of doses will now be produced. This executive then takes that material, nonpublic information and purchases stock in Company B, which supplies needles

93. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *1 (N.D. Cal. Jan. 14, 2022).

94. *O'Hagan*, 521 U.S. at 652.

95. A "security" covers a vast amount of possibilities. Rather than using all possible instances of securities in a company, for ease of exposition, this Note uses stocks or call options when referring to securities in a company.

for Company A's vaccine. After Company A announces that the vaccine has been approved and will be administered to the public, Company B's stock rises significantly. The stock purchased by the executive at Company A in Company B is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

2. Scenario Two: Similar Acquisition Target

Company X is a small market company that conducts specialized cancer research. An executive at Company X receives an email from the CEO that Company Y will be acquiring Company X in the immediate future. The executive at Company X then takes that material, nonpublic information and purchases stock in Company Z, a close competitor of Company X, knowing that it will affect Company Z's stock price. Companies X and Y announce their acquisition, and Company Z's stock price immediately rises. The stock purchased by the executive at Company X in Company Z is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

3. Scenario Three: Bankrupt Competitor

Tech Companies One and Two have been working on a new design that will change the entire market surrounding cell phones. An executive at Tech Company One receives an email from the CEO that their company will run out of funding soon, and the newest design has failed. The executive at Tech Company One then takes that material, nonpublic information and purchases stock in Company Two, knowing that it will affect Tech Company Two's stock price. Tech Company One announces that it will be filing for bankruptcy and bowing out of the race to design a new cell phone. Tech Company Two's stock price immediately rises. The stock purchased by the executive at Tech Company One in Tech Company Two is now worth hundreds of thousands of dollars more, and the executive sells the stock cashing in on the spike in price.

B. APPLYING CLASSICAL THEORY

Banning shadow trading under the classical theory is almost impossible. In *Chiarella*, under what is now known as the classical theory, the Supreme Court held that absent a duty to disclose, there is no

fraudulent activity.[96] The duty to disclose hinges on the relationship between the corporate insider and the shareholders.[97] The unique element of shadow trading is the lack of a fiduciary duty to shareholders. In a shadow trade, the securities purchased are not that of the company for which the corporate insider works. Instead, shadow trading occurs when a corporate insider trades on material, nonpublic information by buying a competitor or closely related company's stock. Thus, the corporate insider has no duty to the shareholders of those companies—all three executives in Scenarios One, Two, and Three trade in this manner.

The executive in Scenario One uses material, nonpublic information and trades in the securities of his company's supplier. Because the executive does not have a fiduciary duty to the supplier's shareholders, the classical theory cannot apply. Similarly, the executives in Scenarios Two and Three lack a fiduciary duty to the closely related corporation's shareholders, making the classical theory inapplicable to them as well.

In this application of the law, Panuwat would also be cleared of any insider trading allegations under the classical theory. Panuwat traded stock options of a similar oncology-based biopharmaceutical company.[98] Panuwat would owe a duty to disclose if it had been the stock of Medivation, as he owes them a fiduciary duty as a corporate insider for Medivation. However, that duty did not exist with Incyte, even though Panuwat allegedly used material, nonpublic information to purchase the stock options involving Incyte.

C. Applying the Misappropriation Theory

The misappropriation theory "premises liability on a fiduciary-turned-trader's deception of those who entrusted him with access to confidential information."[99] This theory captures "'outsiders' to a corporation who have access to confidential information that will affect th[e] corporation's security price when revealed, but who owe no fiduciary or other duty to that corporation's shareholders."[100] The use of the language "the corporation's securities price" as opposed to "a corporation" or "any corporation" implies that the misappropriator must

96. Chiarella v. United States, 445 U.S. 222, 235 (1980).
97. *Id.* at 227.
98. *Panuwat*, 2022 WL 633306, at *2.
99. *O'Hagan*, 521 U.S. at 652.
100. *Id.* at 653.

trade in the securities of one of the corporations who "entrusted" them with the material, nonpublic information.

Applying the misappropriation theory to shadow trading reveals two issues. First, under the theory of shadow trading explained in this Note, shadow traders are corporate insiders—not outsiders—to the company that entrusts them with the material, nonpublic information. For example, in *O'Hagan*, the Court ruled that O'Hagan, as an outsider, owed a duty to his law firm and client when he used material, nonpublic information of a tender offer to purchase stock in the targeted company.[101] Shadow trading differs significantly from the trading in *O'Hagan*. A shadow trader is an insider to the company that entrusts them with the information and the material, nonpublic information is not being used to trade in the securities of the corporations from which it originated.

This leads us to the second issue. The misappropriation theory traditionally covers material, nonpublic information that is used for trading in the companies that produced the material, nonpublic information.[102] The language used in the *O'Hagan* decision is clear that while no fiduciary duty is owed to shareholders, there is a duty owed to the sources—often corporations—that "entrust" a person with insider information.[103] However, if the material, nonpublic information being traded on is not in the securities of the source or the securities of a company involved in a deal with the source, the current doctrine of misappropriation does not cover such activity.

Applying the misappropriation theory to Scenarios One, Two, and Three further emphasizes the issues mentioned above. In all three scenarios, due to their positions in their own companies, the executives are entrusted with material, nonpublic information that will likely affect other companies. The argument can be made that they are outsiders to the companies in which they traded and knew that the material, nonpublic information would affect the stock of the closely related companies in which they traded. It may seem that this is exactly what *O'Hagan* was seeking to prevent.[104] However, O'Hagan traded on material, nonpublic information on a deal that directly involved the corporations he was an insider to and the information *they* "entrusted" him with.[105] The executives in each of the three scenarios—like Panuwat—stepped outside

101. *Id.* at 653-54.
102. *See generally id.*
103. *Id.* at 652.
104. *See id.* at 653.
105. *Id.* at 642.

the directly involved corporation(s) and traded in an outsider's or third party's securities. Therefore, distinct from *O'Hagan*, the executives in all three scenarios cannot be held liable under the misappropriation theory because the companies' securities in which they traded were not the companies who "entrusted" them with the material, nonpublic information.

In the case of *Panuwat*, the SEC argues that the misappropriation theory applies.[106] But that argument can be made because Panuwat signed a company policy agreeing not to trade Medivation securities "or the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors of the Company."[107] This created a fiduciary or contractual duty not to trade on information he learned from his job.[108] In instances where there is no company policy in place to have employees agree not to trade on material, nonpublic information, the analysis of fiduciary duty has yet to be made. In fact, when considering whether Panuwat breached a duty to Medivation when trading in Incyte, the court did not address whether this duty existed solely based on his position at Medivation.[109] Instead, the court only pointed to his "contractual" duty based on the signed Medivation insider trading policy.[110]

Another argument under the misappropriation theory is that even though the executives in all three scenarios did not trade in companies directly involved, they misappropriated material, nonpublic information that belonged to their own corporations. In *Panuwat*, the court has acknowledged, and the SEC concedes, that there are no existing cases where the misappropriation theory was applied to trading on material, nonpublic information involving a third party to the information.[111] This raises the question of whether a corporate insider owes a duty to his or her own company not to trade in the securities of third-party corporations based on material, nonpublic information that was entrusted to them by their own corporation.

106. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *3 (N.D. Cal. Jan. 14, 2022).
107. *Id.* at *1.
108. *Id.* at *5.
109. *Id.* at *6.
110. *Id.*
111. *Id.* at *8.

D. APPLYING RULE 10B5-2

Rule 10b5-2 is used to define where a duty of trust and confidence to keep information private exists.[112] Such duty can exist under three non-exclusive circumstances:

> (1) Whenever a person agrees to maintain information in confidence; (2) Whenever the person communicating the material nonpublic information and the person to whom it is communicated have a history, pattern, or practice of sharing confidences, such that the recipient of the information knows or reasonably should know that the person communicating the material nonpublic information expects that the recipient will maintain its confidentiality; or (3) Whenever a person receives or obtains material nonpublic information from his or her spouse, parent, child, or sibling. . . .[113]

Applying Rule 10b5-2(b)(1), none of the three executives agreed to keep in confidence the material, nonpublic information they traded on. Therefore, no duty can be established under those circumstances. In *Panuwat*[114] the key difference in establishing a duty is that Panuwat signed a company policy agreeing not to deal in the company's securities or "the securities of another publicly traded company, including all significant collaborators, customers, partners, suppliers, or competitors."[115] Had this policy been signed by the executives in the three scenarios, they would all likely have a duty of trust and confidence under 10b5-2(b)(1) and be liable for insider trading as the court in *Panuwat* read the policy to include trading in any publicly traded company, not just the included examples.[116] This means the determination of liability for shadow trading couldturn on the existence of a company policy and how broad or narrow such policy is. For example, if a company policy did not include all publicly traded companies but only the list of "significant collaborators, customers, partners, suppliers, or competitors[,]"[117] the SEC would need to prove that the company's securities being traded were not just those of a collaborator, partner, supplier, or competitor, but a "significant" one. Even further, the breadth of such a list in a company's policy would change liability. If a policy only included collaborators,

112. 17 C.F.R. § 240.10b5-2 (2022).
113. *Id.*
114. Which is most similar to our hypothetical Scenario Two, *supra* Section II.A.2.
115. *Panuwat*, 2022 WL 633306, at *1.
116. *Id.* at *6.
117. *Id.* at *1.

customers, partners, and competitors, but not suppliers, then the executive in Scenario One would not be liable for insider trading because they traded in the needle supplier of the company.

Applying Rule 10b5-2(b)(2), none of the three executives share a history, pattern, or practice of sharing confidences in a way that resembles how the Rule has been previously applied. Few courts have mentioned Rule 10b5-2(b)(2) directly.[118] In *United States v. McGee*, the Third Circuit affirmed the conviction of Timothy McGee after he traded on material, nonpublic information regarding the sale of Philadelphia Consolidated Holding Corporation he received from Christopher Maguire.[119] The court ruled that a rational fact finder could conclude that a history or pattern of sharing confidences existed between McGee and Maguire.[120] Both attended Alcoholics Anonymous meetings where McGee served as a mentor for Maguire.[121] Maguire entrusted McGee with "extremely personal" confidences with the expectation that their conversations would not be disclosed.[122] Maguire also never disclosed any of the things he learned from McGee.[123] This pattern went on for almost a decade, which led the court to conclude there was sufficient evidence of a history and pattern of sharing confidences under Rule 10b5-2(b)(2).[124]

118. *See, e.g.*, United States v. McGee, 763 F.3d 304, 318 (3d Cir. 2014) (finding a history of sharing confidences between the tipper and tippee from Alcoholics Anonymous meetings established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); SEC v. Munakash, No. CV 16-833-R, 2016 WL 9137640, at *1-2 (C.D. Cal. May 16, 2016) (finding the sharing of family issues, failures, financial problems, and other sensitive topics over a lengthy friendship between tipper and tippee established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); SEC v. Conradt, 947 F. Supp. 2d 406, 412 (S.D.N.Y. 2013) (ruling sharing of family illnesses, seeking personal legal advice, legal advice for friends, and tearful exchanges between tipper and tippee established a history or pattern of sharing confidences under Rule 10b5-2(b)(2)); United States v. McPhail, 831 F.3d 1 (1st Cir. 2016) (ruling tipper and tippee shared confidential information in their lengthy relationship as golf partners regarding nonpublic information on several occasions establishing a history or pattern of sharing confidences under Rule 10b5-2(b)(2)).

119. *See generally McGee*, 763 F.3d 308.

120. *Id.* at 318.

121. *Id.* at 309.

122. *Id.* at 317.

123. *Id.*

124. *See id.* at 317-18.

No such pattern or history exists in any of the three scenarios.[125] Unlike *McGee*, *McPhail*, *Conradt*, and *Munakash*, there is no history of back-and-forth confidences but only a single email in a one-sided communication. Therefore, Rule 10b5-2(b)(2) would likely fail to capture instances of shadow trading where executives learn something during the course of their job and trade in a closely related company, much like the executives in all three scenarios.

Under Rule 10b5-2(b)(3), the executives in all three scenarios could only be found to have a duty of trust or confidence if the CEO who sent them the email was a spouse, parent, child, or sibling. Because the CEO in the scenarios did not fall into those close relationships, the executives in all three scenarios had no duty of trust or confidence under Rule 10b5-2(b)(3) and cannot be held liable for insider trading.

III. AMENDING RULE 10B5-2 TO PREVENT FUTURE SHADOW TRADES

A. THE NEED FOR A RULE TO PROTECT AGAINST SHADOW TRADING

The rational behind pohibiting shadow trading is similar to that of the general regulation of securities markets. The Supreme Court, when recognizing the misappropriation theory, did so to protect the integrity of securities markets.[126] The Court reasoned that investors would not venture into a market where trading on inside information was "unchecked by law."[127] Because current insider trading law does not capture shadow trading, it is left unchecked and gives insiders the very advantage the Court was trying to mitigate. This informational advantage also affects ordinary investors directly. The "protection of investors" emphasized in the reasons for regulating insider trading,[128] is not accomplished if shadow traders can leverage knowledge of inside information in purchasing securities. The anonymous trader on the other end of an inside trade who inherits a loss or misses out on a gain in previous theories of insider trading suffers the same consequence of being on the wrong end of shadow trades.[129]

If left under the current conditions, liability of insider trading in instances of shadow trading will rest on company policies. Not only the

125. *See supra* Sections II.A.1, II.A.2, II.A.3.
126. *See* United States v. O'Hagan, 521 U.S. 642, 653 (1997).
127. *See id.* at 658.
128. Guttentag, *supra* note 80, at 212-13.
129. *See* Wang, *supra* note 84, at 64.

existence of a company policy but also the breadth or inclusion of some magic words that would capture the shadow trade in its prohibitions.[130] It is not only unreasonable to allow liability under the law to rest on company policies, but it also creates unfairness and inconsistency in shadow trading prosecutions. For example, if two executives both use material, nonpublic information to trade in a closely related company, but only one of their companies has a shadow trading policy, then two people committing the same act will result in only one of them being liable for insider trading. A recent study suggests only 53 percent of companies currently have a policy like Mediviation's.[131] Furthermore, a policy that prohibits trading in the securities of collaborators, customers, and partners will create different liability than a policy that includes suppliers, and competitors.[132]

The need for a new rule stems from the inability of current common law and rules to capture instances of shadow trading. The classical theory does not apply due to shadow traders' lack of a duty to disclose. Typically, company insiders have a duty to disclose stemming from the fiduciary duty between insiders and the company's shareholders.[133] Shadow traders do not trade in the securities of their own company, nor a company involved in a deal with their company. Instead, they trade in the securities of closely related third party companies, and therefore escape liability under classical theory because they owe no fiduciary duty to the third party's shareholders.

For misappropriation theory to apply to shadow trading, the court would need to take an extremely more aggressive approach than they have traditionally. Presently, the common law imposes liability only on traders entrusted with inside information who then trade in the securities from which the information derived.[134]

The misappropriation theory rests on secretive fiduciary disloyalty.[135] "The insider deceives the source of the information–which the source entrusted to the insider with the expectation that he would act

130. *See supra* Section II.D.

131. *See* Mehta et al., *supra* note 7, at 29. The authors conducted a study on shadow trading involving 267 companies and their insider trading policies finding only 53 percent of companies had a policy prohibiting shadow trading. *Id.*

132. *See supra* Section II.D.

133. Chiarella v. United States, 445 U.S. 222, 227 (1980).

134. *See generally* United States v. O'Hagan, 521 U.S. 642 (1997).

135. Donald C. Langevoort, *"Fine Distinctions" in the Contemporary Law of Insider Trading*, 2013 COLUM. BUS. L. REV. 429, 441 (2013).

as a loyal fiduciary and not take personal advantage of it–by 'feigning' loyalty while acting selfishly."[136] However, the idea of feigning loyalty has typically occurred when an insider knows material, nonpublic information about a company and trades in the securities of that same company or one involved in a deal.[137] No current cases cover shadow trading, which is using that information to trade in a closely related company's securities.[138] It would be a far more aggressive approach to interpret feigning loyalty to apply to any use of material, nonpublic information. The court in *O'Hagan* stated, "misappropriators deal in deception: A fiduciary who pretends loyalty to the principal while secretly converting the principal's information for personal gain dupes or defrauds the principal."[139] O'Hagan "pretend[ed] loyalty" and "dupe[d] or defraud[ed]" the involved parties by purchasing stock options in the targeted company of the tender offer his firm was connected to.[140] O'Hagan owned more options of the target company than any other individual investor.[141] This is disloyal because O'Hagan directly capitalized on a deal involving parties to which he owed a duty of loyalty.

The Court directly pointed out "[t]he misappropriation theory targets information of a sort that misappropriators ordinarily capitalize upon to gain no-risk profits through the purchase or sale of securities. Should a misappropriator put such information to other use, the statute's prohibition would not be implicated."[142] It raises the question: is trading in a security that is completely separate from all companies who entrusted one with inside information still feigning loyalty? The answer to that question must be no. The trusted information that creates the need for loyalty and the selfish capitalization that breaks the loyalty do not stem from the same company. If the trading of securities that "misappropriators ordinarily capitalize upon" has always been from the directly involved companies, then anything outside of that, including trading in a separate third party, has to be considered "put[ting] such information to other

136. *Id.*

137. *See, e.g.*, Complaint at 4-7, SEC v. Glassner, No. 22-CV-04254 (S.D.N.Y. May 24, 2022) (charging biopharmaceutical consultant with insider trading when, after hearing from an executive about an imminent acquisition, he traded in the same company's securities).

138. SEC v. Panuwat, No. 21-CV-06322, 2022 WL 633306, at *8 (N.D. Cal. Jan. 14, 2022).

139. *O'Hagan*, 521 U.S. at 643.

140. *Id.* at 647-48.

141. *Id.*

142. *Id.* at 656.

use."[143] Therefore, a prohibition under misappropriation theory cannot apply and the loophole remains open calling for a rule outside of current misappropriation theory to address shadow trading.

B. RULE 10B5-2(B)(4) PROPOSAL

The amendment to Rule 10b5-2 that would regulate shadow trading should read:

> Whenever a person receives or obtains material, nonpublic information in the course of his or her employment about his or her own company that affects, or could reasonably be expected to affect, the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company and the person knows or reasonably should know that the person who is the source of the material, nonpublic information expects that the person will maintain its confidentiality.

SEC rules are often lengthy[144] but the inclusion of all the necessary language is needed for the rule to function. Here, the specific language of "affects, or could reasonably be expected to affect, the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company" in the proposed Rule 10b5-2(b)(4) is a non-exclusive list of indicia as to what affecting a closely related company could be. This is important for narrowing the companies affected by shadow trading. Outside of common sense as to what would affect a closely related company, this list serves as a starting point for courts to consider. This allows for factors like market size, impact, relatedness, and predictability to determine liability in shadow trades.

The "knows or reasonably should know that the person who is the source of the material, nonpublic information expects that the person will maintain its confidentiality" is expected to only apply to communications that would create an expectation of confidentiality. For example, an email or other communication from the CEO stating the company is doing well would not create an expectation of confidentiality. However, any communication from the CEO not made to the public that reveals an imminent merger, acquisition, product release, earnings report, bankruptcy, etc., would create a reasonable expectation of confidentiality.

143. *See id.*
144. *See, e.g.*, 17 C.F.R. § 240.10b5-2(b)(3) (2022).

C. APPLYING 10B5-2(B)(4)

Scenario One: Supplier

The executive in Scenario One took the material, nonpublic information that the vaccine had been approved and purchased stock in the corporation's biggest needle supplier.[145] The executive did this anticipating that when the news was released, the needle supplier's stock price would rise. The needle supplier would have an extreme boost in production and sales of needles, given the approval of a worldwide vaccine, and the stock price would reflect this after the announcement is made. The executive also should have reasonably known that the CEO expects him to keep the approval of the vaccine confidential, as that information will affect their own company significantly and had not yet been disclosed to the public.

Since the executive traded on material, nonpublic information, he expected to affect a closely related company and was expected to keep that information in confidence he would be liable for insider trading under proposed Rule 10b5-2(b)(4). Rule 10b5-2(b)(4) specifically targets this kind of shadow trading by establishing a duty in instances where insiders possess material, nonpublic information that will affect a closely related company in a meaningful way. However, if the executive had purchased stock in a major hotel or airline, the executive would not be liable under the proposed 10b5-2(b)(4). This is because, while vaccines for deadly viruses may affect travel, a hotel or airline is not a closely related company to a vaccine producer in the same manner as a direct needle supplier would be and does not have the same chances of a minimal risk trade.

Scenario Two: Similar Acquisition Target

The executive in Scenario Two took the material, nonpublic information that an acquisition of Company X, by Company Y, was imminent and purchased stock in Company Z, the corporation's biggest competitor.[146] The executive did this anticipating that when the news was released, the biggest competitor's stock price would rise as it would be a target for a similar acquisition. The executive also should have reasonably known that the CEO expects her to keep the news of the acquisition

145. *See supra* Section II.A.1.
146. *See supra* Section II.A.2.

confidential as that information will affect their own company significantly and had not yet been disclosed to the public.

Similar to Scenario One, proposed Rule 10b5-2(b)(4) captures this shadow trade as well because the executive traded on material, nonpublic information that she could reasonably expect to affect her company's biggest competitor and was expected to keep that information in confidence. The language of "the equity, earnings, cash flows, market value, financial condition, future prospects, or stock price of a closely related company" included in proposed Rule 10b5-2(b)(4) allows for regulators to consider market size in shadow trades similar to Scenario Two.

If the executive in Scenario Two worked at a small clothing line, she would not be liable for insider trading under proposed Rule 10b5-2(b)(4). Because the clothing market is so vast and diverse the acquisition of one clothing line does not create a reasonable expectation that any clothing lines will follow nor create accurate indicia of which clothing lines would be up for a similar acquisition the same way it would in a small market.

Scenario Three: Bankrupt Competitor

The executive in Scenario Three took the material, nonpublic information that Tech Company One was going bankrupt and purchased stock in the corporation's biggest and only competitor.[147] The executive did this anticipating that when the bankruptcy news was released, the competitor's stock price would rise. The executive also should have reasonably known that the CEO expects him to keep the news of bankruptcy confidential as that information will affect their own company significantly and had not yet been disclosed to the public.

Similar to Scenarios One and Two, Rule 10b5-2(b)(4) captures this shadow trade because the executive traded on material, nonpublic information that he could reasonably expect to affect his company's biggest competitor and was expected to keep that information in confidence. Similarly to Scenario Two, the language of Rule 10b5-2(b)(4) allows for consideration of market size. Here, if the executive in Scenario Three worked at a company in a large market, they would not be liable for insider trading. This is because in a vast market one bankruptcy does not create nearly the same effect on competitors compared to Scenario Three where there was only a single competitor in the market.

147. *See supra* Section II.A.3.

CONCLUSION

When done in specific circumstances, shadow trading allows for the exact minimal-risk trades courts have spent decades crafting common law trying to prevent. The cleverness of those seeking significant gains with minimal risks has allowed them to abuse a lophole in insider trading law. Until this loophole is closed, shadow traders are one step ahead of current regulations. "[I]nvestors do not expect the playing field to be level, but they do expect that those who 'have special access to information, because of employment or other relationships, should be barred from using that information to gain an advantage over the rest of us.'"[148] In an attempt to close this loophole, a broader and more aggressive reading of the common law to capture shadow trading would only contribute to continuing insider trading law's "topsy-turvy" development.[149] Amending Rule 10b5-2 to include a fourth circumstance in which a duty of trust in confidence exists would close the loophole that currently permits shadow trading in a much clearer and more concise manner.

148. SEC v. Talbot, 530 F.3d 1085, 1097 (9th Cir. 2008) (quoting Barbara Bader Aldave, *Misappropriation: A General Theory of Liability for Trading on Nonpublic Information*, 13 HOFSTRA L. REV. 101, 123 (1984) (comparing trading in a market with insiders misappropriating information to playing a game against someone with loaded dice)).

149. *See* Quigley, *supra* note 50, at 188 (citing United States v. Whitman, 904 F. Supp. 2d 363, 372 (S.D.N.Y. 2012) (Rakoff, J.) (remarking on "the topsy-turvy way the law of insider trading has developed in the courts"), *aff'd*, 555 F. App'x 98 (2d Cir. 2014)).

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Law Review/Journal	**Yes**
Journal(s)	**New York University Journal of International Law and Politics**
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This applicant has certified that all data entered in this profile and any application documents are true and correct.

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June 12, 2023

The Honorable Jamar Walker
United States District Court
Eastern District of Virginia
Albert V. Bryan United States Courthouse
401 Courthouse Square
Alexandria, VA 22314

Dear Judge Walker,

I am writing to apply for a clerkship in your chambers for the 2024-2025 term. I am a rising third-year student at New York University School of Law, where I am the Senior Notes Editor of the New York University Journal of International Law and Politics, a research assistant for Professor Helen Hershkoff, and a teaching assistant for Professor Andrew Weissman. I have been the Vice President of the Prosecution Legal Society and the Social and Mentorship Chair for the National Security Law Society.

I am also particularly interested in this clerkship as I lived and worked in D.C. in the years prior to law school and returned last summer to intern. Indeed, it is my ambition to work for the government and practice in D.C..

As you will see from my attached resume, I have extensive legal work experience, first as a paralegal and then as an intern at the Department of Justice across the various sections and US Attorney's Offices. As a paralegal, I assisted in document review and legal citation checking for complex federal investigations. I also worked on and attended several trial cases, including *United States v. Vorley* and *United States v. Bases*. As a DOJ intern, I performed legal research and drafted briefs and motions for submission to the court, including motions in limine regarding various evidentiary issues. Currently, I am a summer associate at Sullivan & Cromwell, and am engaged in detailed research across a variety of litigation matters. Based on these experiences and my exemplary work ethic, I am prepared for the exciting challenges of a federal judicial clerkship.

My resume, unofficial transcript, and writing sample are submitted with this application. The writing sample is a memorandum discussing potential reforms to the legal standard for pen registers, written for my externship at the US Attorney's Office for the Southern District of New York.

Letters of recommendation from the following people will arrive separately:

Chief Avi Perry US Department of Justice - Criminal Fraud Section, Market Integrity & Major Frauds Unit Washington D.C. Avi.Perry@usdoj.gov 202-770-7741	Professor Helen Hershkoff NYU School of Law New York, New York Hershkoff@mercury.law.nyu.edu 212-998-6285.	Professor Andrew Weissman NYU School of Law New York, New York andrewweissmann@gmail.com; aw97@nyu.edu 917-575-2171.	Professor Richard Brooks NYU School of Law New York, New York rrb5@nyu.edu 212-998-6285; 203-500-9002

I have also attached a list of references with whom I have worked directly over the course of my legal career.

Please let me know if I can provide any additional information. I can be reached by phone at 631-942-8085 or by email at bbg250@nyu.edu. Thank you very much for considering my application.

Respectfully,

Berke Gursoy
Candidate for Juris Doctor 2024

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National Security Law Society, Social Outreach and Mentorship Chair
Professor Andrew Weissman, Criminal Procedure Teaching Assistant

CORNELL UNIVERSITY, Ithaca, NY
B.A. in Government, Economics, and History; minor in Near Eastern Studies, May 2018
Honors: Dean's list, Academic All-Ivy Men's Rugby Team 2017
Activities: Pi Lambda Sigma (government professional fraternity), Founding Member and Vice President
Cornell International Affairs Observer, Writer
Publication: *The Eagle's Rise: Napoleon Bonaparte's First Campaign and the Birth of Napoleonic Warfare*, published in the ARMSTRONG UNDERGRADUATE JOURNAL OF HISTORY (2019)

EXPERIENCE

SULLIVAN & CROMWELL, New York, NY
*Summer Associate***,** May 2023 – Present

U.S. ATTORNEY'S OFFICE: SOUTHERN DISTRICT OF NEW YORK, CRIMINAL DIVISION, New York, NY
Legal Intern, January 2023 – May 2023
Drafted several *in limine* motions. Conducted legal research on topics including self-defense law within the Second Circuit, the standard for involuntariness under Miranda, and the applicability of criminal charges. Performed extensive document review.

PROFESSOR HELEN HERSHKOFF, NYU SCHOOL OF LAW, New York, NY
Research Assistant, May 2022 – August 2022 and January 2023 – Present
In preparation for the annual Civil Procedure Supplement written by Professor Hershkoff, conducted legal research in lower courts' application of the Supreme Court's decision in *Ford Motor Co. v. Montana Eighth Judicial Dist.* Conducted legal research and drafted chapters of the yearly update memo for the Civil Procedure casebook: Friedenthal, Miller, Sexton & Hershkoff, Civil Procedure: Cases and Materials.

U.S. DEPARTMENT OF JUSTICE: ANTITRUST DIVISION, CRIMINAL SECTION, Washington, DC
Legal Intern, August 2022 – January 2023
Drafted several *in limine* motions. Conducted legal research on topics including the pertinency of spousal privilege to common law marriages, Circuit interpretations of Fed. R. Crim. P. 6(e), and the application of various Fed Rules Evidence within the 11th Circuit.

U.S. DEPARTMENT OF JUSTICE: CRIMINAL DIVISION, FRAUD SECTION, Washington, DC
Legal Intern, May – July 2022
Drafted an MLAT request, a Pen Register application, letters to foreign officials regarding sharing of evidence, a Memorandum on charging decisions under the Foreign Corrupt Practices Act, and various motions. Conducted extensive document review. Researched the Crime Fraud exception to attorney-client privilege in certain Circuit Courts and performed trial prep research relating to *Daubert* and other anticipated *in limine* motions.

U.S. DEPARTMENT OF JUSTICE: CRIMINAL DIVISION, FRAUD SECTION, Washington, DC
Paralegal Specialist II (Contractor-CACI), August 2019 – August 2021
Participated in all facets of trial preparation and proceedings for two actions and was awarded the U.S. Department of Justice Performance Award for achievement during trial. Created exhibits and charts for use as evidence, tracked admission of exhibits into evidence and monitored trial proceedings. Reviewed and processed incoming documents for relevance to investigations and for criminal indictment. Drafted subpoenas, cover letters, and preservation requests. Edited Motions for both content and style.

HUDSON INSTITUTE, Washington, DC
Research Intern, May – November 2017 and November 2018 – April 2019
Gathered open-source intelligence and wrote mock intelligence reports for use in nuclear terrorism simulation held for members of Congress and their staff. Edited Articles for both content and style.

COMMISSION ON SECURITY AND COOPERATION IN EUROPE, Washington, DC
Max Kampelman Policy Fellow, U.S. Helsinki Commission, June – September 2018

ADDITIONAL INFORMATION
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Institution ID: **002785**
Page: **1 of 1**

New York University
Beginning of School of Law Record

Fall 2021

School of Law
Juris Doctor
Major: Law

Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Torts	LAW-LW 11275	4.0	B+
Instructor: Mark A Geistfeld			
Procedure	LAW-LW 11650	5.0	A-
Instructor: Helen Hershkoff			
Contracts	LAW-LW 11672	4.0	B
Instructor: Richard Rexford Wayne Brooks			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Robert L Howse			

	AHRS	EHRS
Current	15.5	15.5
Cumulative	15.5	15.5

Spring 2022

School of Law
Juris Doctor
Major: Law

Constitutional Law	LAW-LW 10598	4.0	A
Instructor: Daryl J Levinson			
Lawyering (Year)	LAW-LW 10687	2.5	CR
Instructor: Tyler Rose Clemons			
Legislation and the Regulatory State	LAW-LW 10925	4.0	A-
Instructor: Adam B Cox			
Criminal Law	LAW-LW 11147	4.0	B+
Instructor: Ekow Nyansa Yankah			
1L Reading Group	LAW-LW 12339	0.0	CR
Instructor: Robert L Howse			
Financial Concepts for Lawyers	LAW-LW 12722	0.0	CR

	AHRS	EHRS
Current	14.5	14.5
Cumulative	30.0	30.0

Fall 2022

School of Law
Juris Doctor
Major: Law

Colloquium on Constitutional Theory	LAW-LW 10031	2.0	A
Instructor: Daryl J Levinson, Emma M Kaufman			
Criminal Procedure: Fourth and Fifth Amendments	LAW-LW 10395	4.0	A
Instructor: Andrew Weissmann			
International Law	LAW-LW 11218	3.0	B
Instructor: Mattias Kumm			
Evidence	LAW-LW 11607	4.0	A
Instructor: Daniel J Capra			

	AHRS	EHRS
Current	13.0	13.0
Cumulative	43.0	43.0

Spring 2023

School of Law
Juris Doctor
Major: Law

Complex Litigation	LAW-LW 10058	4.0	B+
Instructor: Samuel Issacharoff, Arthur R Miller			
Prosecution Externship - Southern District Seminar	LAW-LW 10835	2.0	A-
Instructor: Margaret S Graham, Negar Tekeei			
Prosecution Externship - Southern District	LAW-LW 11207	3.0	CR
Instructor: Margaret S Graham, Negar Tekeei			
Income Taxation	LAW-LW 11994	4.0	A
Instructor: Daniel Jacob Hemel			
National Security Law	LAW-LW 12256	2.0	A-
Instructor: Ryan Goodman, Andrew Weissmann			

	AHRS	EHRS
Current	15.0	15.0
Cumulative	58.0	58.0

Staff Editor - Journal of International Law & Politics 2022-2023

End of School of Law Record

TRANSCRIPT ADDENDUM FOR NYU SCHOOL OF LAW
JD CLASS OF 2023 AND LATER & LLM STUDENTS

I certify that this is a true and accurate representation of my NYU School of Law transcript.

Grading Guidelines

Grading guidelines for JD and LLM students were adopted by the faculty effective fall 2008. These guidelines represented the faculty's collective judgment that ordinarily the distribution of grades in any course will be within the limits suggested. An A + grade was also added.

Effective fall 2020, the first-year J.D. grading curve has been amended to remove the previous requirement of a mandatory percentage of B minus grades. B minus grades are now permitted in the J.D. first year at 0-8% but are no longer required. This change in the grading curve was proposed by the SBA and then endorsed by the Executive Committee and adopted by the faculty. Grades for JD and LLM students in upper-level courses continue to be governed by a discretionary curve in which B minus grades are permitted at 4-11% (target 7-8%).

First-Year JD (Mandatory)	**All other JD and LLM (Non-Mandatory)**
A+: 0-2% (target = 1%) (see note 1 below)	A+: 0-2% (target = 1%) (see note 1 below)
A: 7-13% (target = 10%)	A: 7-13% (target = 10%)
A-: 16-24% (target = 20%)	A-: 16-24% (target = 20%)
Maximum for A tier = 31%	***Maximum for A tier = 31%***
B+: 22-30% (target = 26%)	B+: 22-30% (target = 26%)
Maximum grades above B = 57%	***Maximum grades above B = 57%***
B: remainder	B: remainder
B-: 0-8%*	B-: 4-11% (target = 7-8%)
C/D/F: 0-5%	C/D/F: 0-5%

The guidelines for first-year JD courses are mandatory and binding on faculty members; again noting that a mandatory percentage of B minus grades are no longer required. In addition, the guidelines with respect to the A+ grade are mandatory in all courses. In all other cases, the guidelines are only advisory.

With the exception of the A+ rules, the guidelines do not apply at all to seminar courses, defined for this purpose to mean any course in which there are fewer than 28 students.

In classes in which credit/fail grades are permitted, these percentages should be calculated only using students taking the course for a letter grade. If there are fewer than 28 students taking the course for a letter grade, the guidelines do not apply.

Important Notes

1. The cap on the A+ grade is mandatory for all courses. However, at least one A+ can be awarded in any course. These rules apply even in courses, such as seminars, where fewer than 28 students are enrolled.
2. The percentages above are based on the number of individual grades given – not a raw percentage of the total number of students in the class.
3. Normal statistical rounding rules apply for all purposes, so that percentages will be rounded up if they are above .5, and down if they are .5 or below. This means that, for example, in a typical first-year class of 89 students, 2 A+ grades could be awarded.
4. As of fall 2020, there is no mandatory percentage of B minus grades for first-year classes.

NYU School of Law does not rank students and does not maintain records of cumulative averages for its students. For the specific purpose of awarding scholastic honors, however, unofficial cumulative averages are calculated by the Office of Records and Registration. The Office is specifically precluded by faculty rule from publishing averages and no record will appear upon any transcript issued. The Office of Records and Registration may not verify the results of a student's endeavor to define his or her own cumulative average or class rank to prospective employers.

Scholastic honors for JD candidates are as follows:

Pomeroy Scholar:	Top ten students in the class after two semesters
Butler Scholar:	Top ten students in the class after four semesters
Florence Allen Scholar:	Top 10% of the class after four semesters
Robert McKay Scholar:	Top 25% of the class after four semesters

Named scholar designations are not available to JD students who transferred to NYU School of Law in their second year, nor to LLM students.

Missing Grades

A transcript may be missing one or more grades for a variety of reasons, including: (1) the transcript was printed prior to a grade-submission deadline; (2) the student has made prior arrangements with the faculty member to submit work later than the end of the semester in which the course is given; and (3) late submission of a grade. Please note that an In Progress (IP) grade may denote the fact that the student is completing a long-term research project in conjunction with this class. NYU School of Law requires students to complete a Substantial Writing paper for the JD degree. Many students, under the supervision of their faculty member, spend more than one semester working on the paper. For students who have received permission to work on the paper beyond the semester in which the registration occurs, a grade of IP is noted to reflect that the paper is in progress. Employers desiring more information about a missing grade may contact the Office of Records & Registration (212-998-6040).

Class Profile

The admissions process is highly selective and seeks to enroll candidates of exceptional ability. The Committees on JD and Graduate Admissions make decisions after considering all the information in an application. There are no combination of grades and scores that assure admission or denial. For the JD Class entering in Fall 2021 (the most recent entering class), the 75th/25th percentiles for LSAT and GPA were 174/170 and 3.93/3.73.

Updated: 10/4/2021

U.S. Department of Justice

Criminal Division

Fraud Section *Washington, D.C. 20530*

May 31, 2023

Your Honor:

I write to recommend Berke Gursoy as an outstanding candidate for a judicial clerkship. Berke's academic record and credentials speak for themselves. I write to offer my perspective on his personal qualities. I worked closely with Berke during his time serving as a paralegal at the U.S. Department of Justice, and I have complete confidence he will be a first-rate law clerk. Among the dozens of interns and paralegals I have supervised as a federal prosecutor, Berke stands out as one of the smartest and most reliable.

Berke was one of two principal paralegals on my three most significant cases, including two multi-week jury trials. In each matter, he showed a strong work ethic, an appreciation for detail, and (most importantly) good judgment. Despite around-the-clock hours and the high pressure of federal criminal trials (during the coronavirus pandemic, no less), Berke never missed a beat. He threw himself into trial preparation—finding key documents, helping to prepare witnesses, and making sure no detail went overlooked. The attorneys came to trust his judgment and to rely on him for crucial tasks.

Reflecting on my own experience as a law clerk in federal district court and the First Circuit Court of Appeals, I believe Berke is exactly the type of person who will excel in a clerkship. He is smart, hard-working, attentive to details, easy to get along with, and full of integrity. Berke also is a true team player, willing to work hard in support of a greater mission. I am certain he will serve with distinction as a clerk and be a welcome addition in chambers.

Please don't hesitate to call or email me if you have any questions. I can be reached at (202) 616-4619 or avi.perry@usdoj.gov.

Yours,

Avi Perry
Chief
Market Integrity & Major Frauds Unit
Fraud Section, Criminal Division
U.S. Department of Justice

NYU LAW

ANDREW WEISSMANN
Professor of Practice

School of Law
Center on the Administration of Criminal Law
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June 12, 2023

RE: Berke Gursoy, NYU Law '24

Your Honor:

I write to recommend Berke Gursoy for a clerkship. At NYU School of Law, I taught Berke in both my Criminal Procedure and National Security courses. Based on his work in both classes, I selected Berke to be my Teaching Assistant in my 2023-24 Criminal Procedure course. As that appointment would suggest, I recommend him highly as a law clerk. I have no doubt that you would find him sharp, creative, diligent, efficient, and thorough, and a careful and clear writer. Berke is also a delight to work with and I am confident he would be a valued and collegial addition to your chambers.

I met Berke in the fall of 2022 in my course Criminal Procedure: Fourth, Fifth and Sixth Amendments. Berke was a consistently thoughtful participant within and outside of class. I was not at all surprised when he received an A (grades are given out blind).

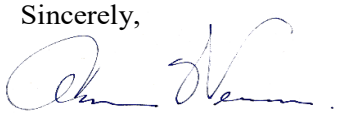
Then in spring 2023, Berke was a member of my National Security seminar, where I got to know him better and was able to assess his writing abilities (the seminar had 27 students and required the submission of three papers). Berke continued to be a thoughtful and diligent participant in class, asking clear and cogent questions, demonstrating his deep immersion in the assigned material and his inquisitive mind. His three papers were excellent: he picked interesting topics, researched them well, and wrestled with the pros and cons of a topic. His writing was also unusually well organized and clear, and unmarred by typos and other distracting errors. Again, Berke received an A in the class, given his stellar performance.

Based on all of this, and his clear enthusiasm for the subject matter in both classes, he was my first choice to be my sole Teaching Assistant for my Criminal Procedure course this upcoming academic year. Indeed, I know Berke is particularly interested in criminal law, and worked at the Department of Justice as a paralegal in the Fraud Section (a section for which I served as Chief for four years prior to Berke's tenure there). We have discussed his work there and his clear enthusiasm for the work of that section and the Department in general. And at NYU he has continued through externships to stay connected to this type of work in both the Antitrust Division and the Southern District of New York U.S. Attorney's Office.

Finally, Berke is a pleasure to deal with, and I have no doubt will work very well with other clerks, displaying collegiality and intellectual curiosity.

Please let me know if there is any further information I can provide about Berke. I can be reached by email at aw97@nyu.edu or 917-575-2171.

Sincerely,



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June 5, 2023

Dear Judge:

I am happy to recommend Berke Gursoy for a judicial clerkship with you following his graduation from New York University School of Law in May 2024. I know Berke as a student and as a Research Assistant, and am confident he can handle the rigor and challenges of a fast-paced chambers.

Berke was a student his first year at NYU in my required course in Procedure. I taught the course remotely, and getting to know the students as individuals presented many challenges for me. However, Berke often came to "Zoom" office hours and asked insightful, thoughtful questions, and I formed a highly favorable opinion of him. I also have permission to share that I talked at length with Berke when he experienced a complicated medical condition that could easily have derailed his 1L year. Berke somehow remained focused, determined, and calm, and performed exceptionally well on my examination. (Berke tells me that the condition is now under control and fortunately behind him.)

I was very pleased to work with Berke as a Research Assistant—first, during his 1L summer when he worked with me and my co-author Dean Troy McKenzie in helping to update our annual Federal Rules Supplement to accompany our procedure casebook; and second, during his 2L year, when he again worked with me and the Dean in helping to prepare our annual "Update Memo" for faculty users of our casebook. The Update Memo basically surveys case developments in Civil Procedure over the prior year. We include all major Supreme Court and Court of Appeals decisions pertaining to the 1L course, and also provide a sampling of district court decisions that can be used as teaching hypotheticals, possible examination questions, and indications of trends and open questions. Selecting these lower court cases requires not only excellent research skills but also judgment, and Berke demonstrated both. The skills and enthusiasm that he showed as a Research Assistant would surely carry over to his work as a judicial clerk.

In addition to his considerable work with me and the Dean, during 2L year Berke also served as a staff editor of the NYU Journal of Legislation and Public Policy (I am the faculty supervisor), and was selected to be the Senior Notes Editor. JLPP is a relatively new journal at NYU—it was founded by Professor Norman Dorsen and it maintains the very high intellectual standards that Norman modeled and demanded. Berke is an integral member of the team.

Before coming to NYU, Berke worked as a paralegal with the Criminal Fraud Section of the U.S. Department of Justice, and as a 2L student he undertook a very time-intensive internship with the DOJ Antitrust Division and an externship with the U.S. Attorney's Office for the Southern District of New York. As these activities suggest, Berke looks forward to government service and is highly adept working in complex, regulated fields that draw on procedure and administrative law.

I asked Berke to describe himself in a few adjectives and his word choices are spot-on—resilient, determined, curious, and ambitious. He takes on a great deal of responsibility and works hard to achieve excellent results (at Cornell he completed a triple major); he is analytically sharp; and he is truly interested in the law and enjoys legal discussion. For all of these reasons I believe he would be an excellent judicial clerk and a welcome member of chambers. I recommend him with warm enthusiasm.

Thank you for your consideration.

Yours truly,

Helen Hershkoff

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Richard R. W. Brooks
Emilie M. Bullowa Professor of Law

I am delighted to have this opportunity to write to you regarding Berke Gursoy. I have had extensive interactions with Berke, both in class and outside of the classroom context. These occasions have allowed me to develop a good sense of his personal and professional character. I am convinced that Berke is intelligent and motivated, and his work ethic makes him an outstanding candidate for a judicial clerkship. I would like to share with you my somewhat uncommon experience with Berke that has led me to this firm judgment.

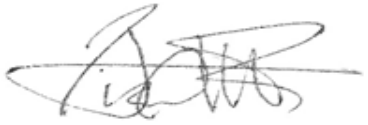
Most students approach faculty to solicit letters of recommendation. In this case, I approached Berke to ask him if he planned to apply for clerkships, which I encouraged him to do, and *I offered* to write a strong letter on his behalf. Why? Here's the background. I first met Berke in the fall of 2021 in my first-year contracts course. Berke immediately impressed me as being among the more thoughtful and well-prepared students in the course. During lectures, he was always engaged and frequently asked questions indicating careful preparation and insight. Based on his classroom performance and our individual meetings during office hours, I would have predicted that Berke would receive one of the top grades in the class. It is not uncommon, of course, for such predictions to fall short of expectations. The first law school exam that students take can be a poor diagnostic of their learning and capabilities. I was, however, more than a little surprised by Berke's exam score. To be sure, it was a difficult examination, and his raw score did not differ so significantly from those who benefited more from the mandatory grading curve. His score was just below the mean, but I had expected it to be well above the mean, like his classroom performance.

It was a puzzle for me, but it was soon resolved when I learned that Berke was hospitalized on multiple occasions in the school year and during the reading period before my final examination. (Berke has consented to me sharing this health information, and I would note without going into further detail that the matter was episodic and no longer an issue.) After learning this information, Berke and I met on multiple occasions in the spring term of this first year, initially to discuss his exam and test-taking approaches, but eventually, our focus turned to his broader academic interests and career choices. These conversations reaffirmed my opinion and assessment of his potential. Berke is a brilliant young man. He has a strong conceptual mind—quick on his feet yet substantive. Moreover, he is resilient and determined. It is this determination, combined with his intelligence, that persuades me of Berke's ultimate ability and likelihood of being an outstanding judicial clerk.

I am confident that, given a chance, Berke will impress you as much as he has me. You will quickly notice that he is a self-starter with a very pleasant and personable manner. His personality and work ethic are well-suited for the intimate and demanding environment of the judicial chambers. I give him my strongest recommendation, and I encourage you to contact me if I may provide you with any more information in support of his consideration.

Sincerely,

Richard R.W. Brooks



A Higher Standard for Pen/Trap Devices: From Relevancy to Specific and Articulable Facts

In this memo, I argue that, considering the sheer breadth of information that a pen/trap device can reveal and the extent of the privacy violation that this represents, the current legal standard for acquiring such a device and the level of judicial oversight of their use are inadequate. I am not advocating for *Smith v. Maryland* or its progeny to be overturned. In addition, I am not calling for an end to the third-party doctrine.[1] Indeed, four decades of case law have clarified that, in the eyes of the judiciary, the information revealed by pen/trap devices is not content and is thus not subject to Fourth Amendment protections. Changing that would radically alter the bounds of criminal investigations. This would make it significantly more difficult for law enforcement to establish the probable cause necessary for more invasive investigative techniques (e.g., search warrants). Instead, I push for a compromise, suggesting that the legal threshold for pen/trap devices should increase from the low bar of relevancy to a higher specific and articulable facts (SAF) standard, akin to the one required for orders under 18 U.S.C. § 2703(d)[2]. Furthermore, implementing a SAF standard for pen/trap devices would prompt an increased level of judicial oversight in their use because this would allow for actual judicial review —a marked improvement over the current judicial rubber stamp. Overall, this reform would increase privacy protections while not substantially burdening law enforcement. It would thus represent a substantial improvement to the current permissive regime.

Definitions

Pen/trap refers to two separate tools of surveillance: a pen register and a trap and trace device. They are deployed together, governed by the same law, and administered through the same

[1] *See generally* Smith v. Maryland, 442 U.S. 735 (1979) (holding that the installation of pen register does not constitute a "search" under the Fourth Amendment and defining the "third-party doctrine" which states an individual does not have a reasonable expectation of privacy in information voluntarily shared with a third-party).
[2] 18 U.S.C. § 2703(d).

device/program.[3] In brief, pen registers record outgoing addressing information, while trap and trace devices record incoming addressing information.[4] The following sections expand on this definition.

The Extent of Applicability of a Pen/Trap Device

Traditionally pen/trap devices were somewhat limited in the extent of their applicability. When the Pen/Trap Statute, 18 U.S.C. §§ 3121–27, was enacted in 1986, the pen register and the trap and trace device were defined narrowly.[5] They were described as devices that were installed on telephones or attached to telephone lines. In this capacity, a pen register would track the telephone numbers dialed out from the surveilled phone, and the trap and trace device could list telephone numbers that were dialed in. However, Congress revised this definition in 2001 as part of the US Patriot Act.[6] Specifically, the act broadened "the communications media" on which a pen/trap device could be installed.[7]

Today, a pen register is defined as "a device or process that records or decodes dialing, routing, addressing, or signaling information transmitted by an instrument or facility from which a wire or electronic communication is transmitted."[8] A trap and trace device is "a device or process which captures the incoming electronic or other impulses which identify the originating number or other dialing, routing, addressing, and signaling information reasonably likely to identify the source of a wire or electronic communication."[9] These definitions are broad, and their breadth is a function

[3] *See* Deborah F. Buckman, Annotation, *Allowable Use of Federal Pen Register and Trap and Trace Device to Trace Cell Phones and Internet Use,* 15 A.L.R. Fed. 2d 537 §2 (2022) (describing the use of pen registers and trap and trace devices and their shared statutory basis).
[4] *See* H. Marshall Jarrett & Michael W. Bailie, *United States Department of Justice, Searching and Seizing Computers and Obtaining Electronic Evidence in Criminal Investigations* 154 (2009), https://www.justice.gov/file/442111/download (stating the nature of pen registers and track and trace devices).
[5] *See* Buckman, *supra* note 3, at 538 (articulating the history of the pen/trap statutes); Pen Registers and Trap and Trace Devices, 18 U.S.C. §§ 3121–3127.
[6] Uniting and Strengthening America by Providing Appropriate Tools Required to Intercept and Obstruct Terrorism Act of 2011(USA PATRIOT Act), Pub. L. No. 107-56, §214, 115 Stat. 272 [hereinafter Patriot Act].
[7] See Buckman, *supra* note 3, at 542 (describing the effects of the Patriot Act upon the pen/trap statutes).
[8] 18 U.S.C. § 3127(3).
[9] 18 U.S.C. § 3127(4).

of "the scope of their components." To illustrate, first, "an instrument or facility from which a wire or electronic communication is transmitted" encompasses a wide variety of communications technologies, including a "non-mobile telephone, a cellular telephone, an Internet user account, an email account, or an IP address." Second, "the definitions' inclusion of all 'dialing, routing, addressing, [and/or] signaling information' encompasses almost all non-content information in a communication."[10]

In sum, under the bounds of 18 U.S.C. § 3127, the government can install a pen/trap device and conduct continuous surveillance of an individual's phone, cell phone, email account, WhatsApp account, IP address, and so on to obtain non-content information.[11] But what is non-content information, and what is content? The distinction is critical, as a pen register is statutorily forbidden from collecting content information.[12] Under 18 U.S.C. § 2510(8), content includes "any information concerning the substance, purport, or meaning of that communication."[13] However, the difference between the two is best presented through analogy. For example, in the context of mail, the content would be the letter itself stored in the envelope. Non-content is everything else, including the "mailing and return addresses, the stamp and postmark, and the size and weight of the envelope when sealed."[14]

Applying this metaphor forward, a phone pen/trap device does not record a conversation. However, it monitors the number dialed, the length of each call, and when each call was made. An email pen/trap does not record what was said in an email, but the government has access to the name of whom was emailed and at what time the message was sent (though not the subject line, as this is

[10] Jarrett & Bailie, *supra* note 4, at 153.
[11] *See* DAVID S. KRIS & J. DOUGLAS WILSON, NATIONAL SECURITY INVESTIGATIONS AND PROSECUTIONS § 18:2 (3rd ed. 2019) [hereinafter NSIP] (describing the scope of uses for pen/trap devices in the aftermath of the Patriot Act).
[12] *See* 18 U.S.C. §§ 3127(3), 3127(4) (articulating that pen/trap devices do not collect any "content information).
[13] 18 U.S.C. § 2510(8).
[14] Daniel J. Solove, *Reconstructing Electronic Surveillance Law*, 72 Geo. Wash. L. Rev. 1701, 1726 (2004).

considered content).[15] An IP address pen/trap does not record the specific URLs a person accessed, but it does record connections between a person's private IP address and the IP addresses of the websites accessed.[16] Therefore, despite the restriction on surveilling content, the amount of information the government can collect through pen/trap is staggering. In a sense, pen/trap surveillance provides a glimpse into an individual's mind, offering an "intimate window" into their "familial, political, professional, religious, and sexual associations."[17] For a phone pen/trap, if the government is surveilling an individual, it can determine if they are calling "a bank, a political headquarters, a church, or a romantic partner."[18] As Justice Stewart observed in his dissent in *Smith*, "[these numbers] easily could reveal the identities of the persons and the places called, and thus reveal the most intimate details of a person's life."[19]

Furthermore, beyond revealing the number dialed, the information provided by a pen/trap is significant. For example, "a lengthy call will suggest that 'the two people on opposite ends of the line knew each other, or at least had something substantial to discuss.'"[20] An IP address pen/trap represents, perhaps, an even greater intrusion. This is because, in tracing how a person uses the internet, the government can "learn the names of stores at which a person shops, the political organizations a person finds interesting, a person's sexual fetishes and fantasies, their health concerns, and so on."[21] Indeed, in *United States v. Soybel,* an IP pen/trap captured the Defendant's

[15] *See* Jarrett & Bailie, *supra* note 4, at 152 (describing the nature of what is captured by a pen/trap device).
[16] *See* Deborah Buckner, *Internet Search and Seizure in United States v. Forrester: New Problems in the New Age of Pen Registers*, 22 BYU J. PUB. L. 499, 514 (2008) (discussing what precisely is captured by an internet pen/trap); *see also* U.S. v. Forrester, 512 F.3d 500, 504 (9th Cir. 2008) (clarifying that if a person visits the New York Times website, the pen/trap does not reveal the specific articles they read but does record that the person New York Times website at http://www.nytimes.com).
[17] United States v. Soybel, 13 F.4th 584, 594 (7th Cir. 2021).
[18] *Id.*
[19] *Smith*, 442 U.S. at 748 (Stewart, J., dissenting).
[20] Orin S. Kerr, *Internet Surveillance Law After the USA Patriot Act: The Big Brother That Isn't*, 97 NW. U. L. REV. 607, 643 (2003).
[21] Solove, *supra* note 14, at 1701, 1728.

visits to Credit Karma and Match.com.[22] In short, pen/trap information can reveal a significant amount of highly personal information without revealing any "content."

Current Standard

Consequently, what current limitations are provided for the use of a pen/trap device? Unfortunately, the answer is not many. In *Smith v. Maryland,* the Court held that the Fourth Amendment does not protect pen registers.[23] In light of this situation, Congress enacted the Pen Trap Statute (Title III of ECPA, codified in 18 U.S.C. §§ 3121–3127) to enact statutory rules for their use.[24] Under the statute, to obtain a pen/trap order, an application must be submitted to a court. The applicants must identify themselves and the law enforcement agency requesting the order, and they must certify that "the information likely to be obtained by such installation and use is relevant to an ongoing investigation."[25]

However, there is no requirement that in their submission to the court the government provide any evidence of relevance. Therefore, the issuing court must take the government's word without question with no judicial review concerning whether this standard has been sufficiently established.[26] The standard for approval is so low as to be nearly worthless: the request does not require justification by evidence, and the judge is required to approve every request. It is, in effect, a rubber stamp.[27] But even if this was not the case, a relevance standard is particularly weak, and

[22] *Soybel,* 13 F.4th at 593 (stating what the pen/trap device had captured while it had been applied to the defendant's server).
[23] *See generally Smith,* 442 U.S. 735.
[24] Buckman, *supra* note 3, at § 2 (reciting the history of the pen/trap statutes).
[25] 8 U.S.C. § 3122(b)(1)-(2).
[26] *See* In re Application of United States, 846 F. Supp. 1555, 1559 (M.D. Fla. 1994); *see also* United States v. Fregoso, 60 F.3d 1314, 1320 (8th Cir. 1995) ("The judicial role in approving use of trap and trace devices is ministerial in nature.")
[27] *See, e.g.,* Ctr. for Democracy & Tech., *CDT's Analysis of S. 2092: Amending the Pen Register and Trap and Trace Statute in Response to Recent Internet Denial of Service Attacks and to Establish Meaningful Privacy Protections (2000),* https://cdt.org/wpcontent/uploads/security/000404amending.shtml (articulating the implications of the standard for pen/trap devices).

"it is hard to imagine how the government could fail to make this showing regardless of how illegitimate its desired use of the pen register might be."[28]

Proposed Reform

Considering the sheer weight of information that a pen/trap device may reveal and the weakness of the current limitations placed upon their use, I call for the above standard to be raised to that of the SAF threshold of a 2703(d) order: an intermediary level between mere relevance and the high bar of probable cause. As an aside, holding the pen/trap device order to the same standard as a 2703(d) order is inherently logical. This is because, in essence, they reveal the same information but on different time horizons: a pen/trap device is for active surveillance entering the future, and a 2703(d) order is for historical data from the past. To illustrate, if the government wants to track to whom an individual is sending emails, they will apply a pen/trap device. In contrast, if they want to learn to whom an individual has sent and received emails for the past six months, they will request a 2703(d) order.[29] As such, for the two to share the same legal standard is common sense.

To obtain a 2703(d) order, "the governmental entity [must] offer specific and articulable facts showing that there are reasonable grounds to believe that the contents of a wire or electronic communication, or the records or other information sought, are relevant and material to an ongoing criminal investigation."[30] This is an intermediary standard between relevancy and probable cause, derived, as the Tenth Circuit has noted, from the Supreme Court's decision in *Terry v. Ohio.*[31] Its purpose is to guard against "fishing expeditions" by law enforcement.[32] Indeed, the most important distinction is that the SAF determination is not conclusory. Law enforcement may not merely

[28] Solove, *supra* note 13, at 1701, 1729.
[29] *See* Jarrett & Bailie, *supra* note 4, at 130-32, 150-54 (comparing and contrasting the information revealed by 2703(d) orders and pen/trap devices).
[30] 18 U.S.C. § 2703(d).
[31] *See* Terry v. Ohio, 392 U.S. 1 (1968) (providing an intermediary standard between a subpoena's relevancy requirement and the probable cause standard for search warrants).
[32] H.R. Rep. No. 102-827, at 31-32 (1994), reprinted in 1994 U.S.C.C.A.N. 3489, 3511-12.

inform the court that SAF exist to satisfy the standard. Rather, they must offer evidence to that effect to the court in their application, and the court must then make an independent determination.[33] Implementing this standard for the use of pen/trap devices would thus bring the judiciary into a regulatory role offering a check on potential prosecutorial overreach. It represents an additional check on the power of law enforcement. No longer would a judge have to approve every application; instead, law enforcement would have to clearly demonstrate that they have SAF and that what they ask for is relevant and material to the investigation at hand. It would be a welcome change to what currently exists, where law enforcement has access to incredibly private information merely on their word. Although, in practice, a short factual summary of the investigation and the role this information serves in advancing the investigation should satisfy this criterion, this increased standard would still be an additional bar—an extra barrier of protection—against abuse.[34]

I am not advocating for a probable cause standard for the use of pen/trap devices because this is the highest legal standard for the use of an investigatory tool.[35] It is what is demanded of search warrants and what is required to institute a wiretap. These tools demand greater proof to justify their use, as they involve a greater invasion of privacy (i.e., they allow law enforcement to access content information). In addition, though there might be overlap at the margins, there is an inherent difference between content and non-content. What I write in an email is inherently more private, and accessing it is a greater intrusion on the part of law enforcement than observing to whom I sent it. Creating a universal probable cause standard for all communicative information would essentially equate content and non-content in the eyes of the law. Moreover, for practical

[33] *See United States v. Kennedy*, 81 F. Supp. 2d 1103, 1109-10 (D. Kan. 2000) (concluding that a conclusory application for a 2703(d) order "did not meet the requirements of the statute.")
[34] Kerr, *supra* note 20, at 639 (arguing that an increase in applicable standard would create additional protections).
[35] *Id.* at 621 (describing the various legal standard that need to be met for the use of certain investigatory tools).

reasons, probable cause should not be the standard. The imposition of probable cause for pen/traps would vastly limit the ability of law enforcement to conduct investigations effectively. It would impose a Catch-22 upon law enforcement, requiring the establishment of probable cause to obtain the information needed to establish probable cause.

Conclusion

Pen/trap devices are one of the most commonly used tools of law enforcement. Creating a higher standard for their use will inevitably impact the course of investigations. As discussed above, the implementation of SAF would bring the judiciary into a functional role in the process, shifting their position from that of a rubber stamp to that of a judge. A higher legal threshold would result in fewer pen/trap devices being approved; however, the threshold is not so high as to significantly increase the difficulty of their use. An increase to a SAF standard would simply mean that the pen/trap device, like the 2703(d) order, is an instrument used once an investigation is further along. It would be used when the information is clearly needed and when it is clear that such information would be relevant and material to the investigation. Thus, I propose that the legal threshold should be increased to ensure greater protection of privacy.

Applicant Details

First Name	**Destinee**
Middle Initial	**E**
Last Name	**Haller**
Citizenship Status	**U. S. Citizen**
Email Address	**destineehaller23@gmail.com**
Address	**Address** Street **845-2B Ivy Meadow Lane** City **Durham** State/Territory **North Carolina** Zip **27707** Country **United States**
Contact Phone Number	**7864402594**

Applicant Education

BA/BS From	**Florida State University**
Date of BA/BS	**May 2019**
JD/LLB From	**Duke University School of Law** **https://law.duke.edu/career/**
Date of JD/LLB	**May 11, 2024**
Class Rank	**School does not rank**
Law Review/Journal	**Yes**
Journal(s)	**Law and Contemporary Problems**
Moot Court Experience	**Yes**
Moot Court Name(s)	**Duke Law Moot Court Team**

Bar Admission

Prior Judicial Experience

Judicial Internships/Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Professional Organization

Organizations **Just the Beginning Organization**

Recommenders

Frakes, Michael
michael.frakes@law.duke.edu
(919) 613-7185
Jones, Trina
Tjones@law.duke.edu
919-613-7177
Siegel, Neil S.
Siegel@law.duke.edu
919-613-7157

This applicant has certified that all data entered in this profile and any application documents are true and correct.

Destinee Haller
845-2B Ivy Meadow Lane
Durham, NC 27707

June 23, 2023

The Honorable Jamar K. Walker
United States District Court for the Eastern District of Virginia
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am writing to express my strong interest in clerking for you for the 2024-25 term. As an incoming third-year law student at Duke Law School, set to graduate in May of 2024, I believe that my skills and experiences make me an excellent fit for your chambers. Moreover, I am particularly drawn to your chambers because of your commitment to diversity in legal field. The law only benefits from diversity, and thus it is great to see judges who are passionate about fostering that diversity.

Throughout my academic and professional journey, I have thrived in fast-paced and demanding environments, where I have honed my ability to multitask and produce high-quality work. One of the most significant experiences that has contributed to my development is my time as a teacher. In this role, I effectively coordinated student assignments and served as a liaison between the administration, students, and parents. I collaborated with a small team to design a creative student curriculum, managed diverse student behaviors, and researched innovative approaches to student learning. These experiences have taught me invaluable strategies for working with individuals from different backgrounds and personalities, as well as the importance of clear and meaningful communication.

During my time at Duke Law, I have focused on enhancing my legal skills in various contexts. Competing in moot court competitions has sharpened my research, writing, and oral advocacy abilities, allowing me to effectively analyze complex legal issues and present compelling arguments. As the secretary of Moot Court, I have also utilized my organizational skills to collaborate with student group leaders, faculty, and judges, organizing events that foster interactions between students and legal experts across diverse fields.

Enclosed with this letter, you will find my resume, Duke Law and undergraduate transcripts, a writing sample, and three letters of recommendation from Professors Neil Siegel, Trina Jones, and Michael Frakes. I would be more than happy to provide any additional information or documents upon request.

Sincerely,
Destinee Haller

DESTINEE HALLER
845-2B Ivy Meadow Lane, NC 64108
destinee.haller@duke.edu | (786) 440-2594

EDUCATION

Duke University School of Law, Durham, NC
Juris Doctor expected, May 2024
GPA: 3.38
Honors: Fred H. and Betty S. Steffey Scholar
Moot Court Board, Secretary
Law and Contemporary Problems, Staff Editor
Activities Bolch Judicial Institute, Student Editor
Womxn of Color Collective (WOCC), Alumni/Development Chair
Black Law Student Association
LEAD Fellow
The Appellate Project (TAP)

Florida State University, Tallahassee, FL
Bachelor of Arts in History and African American Studies, *cum laude*, May 2019
GPA: 3.74
Honors: The Instant Impact Student Leader of the Year, 2018; Trailblazer Award, 2018
Thesis: *The Role of the Disc Jockey in the Civil Rights Movement*
Activities: Alliance for Black Women, *Founder*

EXPERIENCE

Covington & Burling LLP, Washington D.C.
Summer Associate, May 2023 –

Joe L. Webster, Magistrate Judge, Middle District of North Carolina
Judicial Extern, January 2023 – May 2023
- Assisted in drafting legal orders, opinions, and recommendations, ensuring accurate and concise communication of legal analysis and reasoning to support the judicial decision-making process.
- Collaborated with Judge Webster and fellow clerks to conduct thorough legal research and engage in detailed discussions, thereby facilitating informed decision-making on complex civil and criminal cases.

Mintz, Levin, Cohn, **Ferris, Glovsky and Popeo, P.C.**, Boston, MA
1L LCLD Diversity Summer Associate, May 2022 – July 2022
- Drafted affidavit for a client in the Afghanistan Refugee Project.
- Researched Massachusetts Public Records Law to assist in a project regarding donations to public entities and worked collaboratively with research services to ensure the research was thorough.

Kansas City Public Schools, Kansas City, MO
Teacher, August 2019 – May 2021
- Taught English to 100+ high school students, using culturally relevant pedagogy, differentiated instruction, and modified lessons to accommodate students with disabilities, and while managing classroom and student behavior.
- Created a curriculum for teaching Art to students, modifying content and pedagogy as needed to make instruction available online and accessible to all students.
- Administered extracurriculars; served as Head Volleyball Coach for the volleyball team.

ADDITIONAL INFORMATION

Member of Delta Sigma Theta Sorority, Inc. Enjoys playing volleyball and taking my dog on walks. Presented on various diversity and inclusion topics at several conferences at FSU, including inclusivity, appropriation, and colorism. Volunteer with Duke Law's Veteran's Assistance Project and Fair Chance Project.

Destinee Haller

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Durham, NC 27708

(786) 440 - 2594
destinee.haller@duke.edu

1240 NE 208 Terr
Miami, Fl 33179

UNOFFICIAL TRANSCRIPT
DUKE UNIVERSITY SCHOOL OF LAW

2021 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Civil Procedure	Metzloff, T.	3.9	4.50
Contracts	Williams, S.	3.1	4.50
Torts	Frakes, M.	3.2	4.50
Legal Analysis, Research, Writing	Hernandez, S.	*Credit Only*	0.00

2022 WINTERSESSION

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Lawyering in the Executive Branch	Multiple	*Credit Only*	0.50

2022 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Constitutional Law	Adler, M.	3.0	4.50
Criminal Law	Grunwald, B.	3.1	4.50
Property	Wiener, J.	3.7	4.00
Legal Analysis, Research, Writing	Hernandez, S.	3.1	4.00

2022 FALL TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS
Corporate Crime	Buell, S.	3.4	4.00
Federal Courts	Siegel, N.	3.5	4.00
Negotiation	Thomson, C.	3.5	3.00
Foreign Anti-Bribery Law	Brewster, R.	3.5	2.00
Law & Lit: Race & Gender	Jones, T.	3.7	3.00

2023 SPRING TERM

COURSE TITLE	PROFESSOR	GRADE	CREDITS

Judical Decisionmaking	Lemos, M.	3.6	3.00
Ethics in Action	Metzloff, T.	3.8	2.00
Administrative Law	Benjamin, S.	3.2	3.00
Race and Law Speaker's Series	Jones, T.	*Credit Only*	1.00
Externship	Gordon, A.	*Credit Only*	3.00
Externship Seminar	Gordon, A.	*High Pass*	1.00

TOTAL CREDITS: 60
CUMULATIVE GPA: 3.38

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Destinee Haller

Dear Judge Walker:

I am writing to recommend enthusiastically Destinee Haller for a federal judicial clerkship. She is a wonderful asset to any classroom – very reflective, intellectually curious, and clever. I have no doubt whatsoever that she would be a tremendous addition to your judicial office.

I first met Destinee in the fall of 2021 when she was a student in my first-year Torts course. Destinee was perhaps the most inquisitive and intellectually curious student in my class of 49 that year. She is one of the most memorable students I have taught in my time at Duke. She frequently volunteered during class discussions, likely on a daily basis. Her contributions in those instances were excellent. Between those moments and my other interactions with her during cold-calls and office-hours discussions, it became clear to me that she was engaging with concepts and arguments that were at a high level of sophistication. She also picked up on the legal reasoning skills I was trying to impart very quickly. I strongly believe that my interactions with Destinee during the class discussions were quite helpful to her classmates in their own development of legal reasoning skills and their refinement of the tort doctrines we were learning. As you can imagine, first semester 1L students go through a lot of development quickly and Destinee was at the forefront of this development in her class. Destinee would often introduce new hypotheticals that facilitated a very nice clarification of the materials at hand. Her inquiries further contributed to my own ongoing development. After over a decade of teaching Torts, I continue to expand on my understanding of the contours of tort law and I attribute this to my interactions with my students, particularly students like Destinee.

My approach to teaching Torts is to try and construct as many counterarguments as possible to the main arguments at play—often aided by pairings of similar cases—and then to consider the best counterarguments to those original counterarguments. While my goal is to challenge the students in this regard and push the conversation a way down this path, I try to halt this process at some point for the sake of simplicity. Destinee demonstrated no difficulty in keeping up with this progression and in fact is skilled at pointing out any simplifications that I make and pushing the conversation one step further. These are all signs of a budding lawyer with a keen intuition.

All in all, it is a true pleasure to be able to teach and intellectually engage with Destinee. Her inquisitiveness and deep analytical reasoning truly stand out in class and beyond. She would be an excellent addition to your office, and I am confident that she would benefit from the opportunity. If you have any questions, please do not hesitate to contact me at michael.frakes@law.duke.edu or 919-613-7185.

Sincerely,

Michael D. Frakes
A. Kenneth Pye Professor of Law and Professor of Economics,
Duke University Research Associate,
National Bureau of Economic Research

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Destinee Haller

Dear Judge Walker:

I am delighted to recommend Destinee Haller for your consideration as a judicial clerk. Destinee was a student in my Law and Literature: Race and Gender seminar in the fall of 2022. She also enrolled in the Race and the Law Speakers Series, a one-credit, ungraded course that I offered in the spring of 2023. Because of the small size of the seminar and Destinee's deep engagement with the material in both classes, I believe that I know her well. Destinee is a simply outstanding student. She is extremely smart and hard working. In the seminar, she was always well prepared for class and she actively participated in class discussions. I was impressed by her ability to handle complex and sometimes controversial subject matter with a deft hand and in a manner that respectfully engaged competing viewpoints. Her peers appeared to be equally impressed; when Destinee offered commentary or asked questions, everyone listened.

The seminar also revealed that Destinee is a meticulous reader. She does not miss anything, even seemingly minor details. This attention to detail allowed Destinee to observe subtle nuances in the material that less discerning students overlooked. Indeed, her written reflections were among the best that I have received in almost three decades of teaching. Destinee's weekly submissions were clearly and elegantly written, and displayed a wisdom that was surprising in someone of her age.

The Speakers Series had a much larger enrollment, consisting of approximately 130 students. Even in a class this large, Destinee managed to stand out. Each week, after reading assigned materials, students were required to submit two questions from which my TAs and I selected about 10 to present to the week's speaker. Week after week, Destinee's questions made the cut (from about 260 questions). This was astonishing given the number of students and the range of talent reflected in the class. Yet, Destinee's questions reflected a depth of knowledge and an intellectual curiosity and rigor that could not be ignored.

I know that Destinee has given a lot of thought to clerking. During her first year of law school, she approached me to learn more about judicial clerkships. I strongly encouraged her to clerk, not for the credential, but because I believe clerking presents young lawyers with an unparalleled opportunity to learn and to grow. Destinee subsequently sought out a judicial externship with a magistrate judge, which she found deeply rewarding.

If you hire Destinee, I believe you will be extremely pleased with her work and delighted with her presence in your chambers. Destinee is smart. She is fair. She is incredibly hard working. And she is kind. In short, I believe she is everything that one could hope for in a clerk.

Please let me know if I can be of further assistance.

Sincerely,

Trina Jones
Jerome M. Culp Professor of Law

Trina Jones - Tjones@law.duke.edu - 919-613-7177

Duke University School of Law
210 Science Drive
Durham, NC 27708

June 26, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Re: Destinee Haller

Dear Judge Walker:

Destinee Haller is very bright and asks insightful questions. She loves learning about the law and will add much needed diversity to the legal profession. She exudes kindness and professionalism. I am very pleased to recommend her for a clerkship in your chambers.

Destinee enrolled in my Federal Courts class during the Fall 2022 semester. I view Federal Courts as one of the most demanding classes that the Law School offers—and as critical for clerking and litigating. Many Duke Law students avoid the class because of its formidable reputation and potentially depressing effect on their grade point averages; for example, only twenty-two students enrolled in my course. The class covers challenging subjects: *Marbury v. Madison* (1803) as a federal courts case; congressional control of federal-court jurisdiction; U.S. Supreme Court reform, including Court expansion; the justiciability doctrines; the ins and outs of state sovereign immunity; Section 1983 litigation and individual officer immunity; the abstention doctrines; U.S. Supreme Court review of state-court judgments; and federal habeas-corpus review of state-court criminal convictions and sentences.

Destinee ignored the suggestions of her classmates to play it safe by taking classes that would be sure to increase her grade point average; she wanted to challenge herself and learn as much as she could. She prepared vigorously for my class, and so she was always prepared when I called on her. She also volunteered to answer difficult questions or apparent puzzles that I would pose to the class, and she routinely stayed after class and attended office hours to asked me penetrating questions about the doctrines we were learning. I was so impressed by the quality of her participation and questions that I advised her to apply for judicial clerkships.

My Federal Courts class attracted many of the most talented students in the Law School. To distinguish among them, I wrote a very challenging final examination. Destinee performed well, earning a 3.5 in the course.

Destinee has a compelling personal story. She was raised by a single mother who went to school and worked several jobs while protecting Destinee and her brother from the injustices of their surroundings. Destinee attended the same high school as Trayvon Martin. As she told me, “One day he was a tall, popular upperclassman, and the next day he was gone. I feel as though I came to consciousness during the trial.” Unlike almost all of her classmates, she decided to go to law school after hearing President Obama issue a call for legal and social change following the murder of George Floyd. The legal profession generally, and the ranks of our nation’s law clerks specifically, would benefit enormously from greater diversity of life experiences and personal perspectives, and Destinee has much to contribute in this regard.

Destinee would fit in well in the close confines of chambers. She is caring, respectful, mature, professional, and humble. She is uncommonly eager to keep learning and improving, and she wants to clerk for a judge who would be willing to mentor her both during the clerkship and beyond.

Destinee Haller is a strong candidate for a judicial clerkship—stronger than her overall grade point average of 3.38, which reflects the learning and adjusting that she had to do during her first year of law school. I hope that you will give her application serious consideration. Please feel free to contact me if I can be of further help as you consider her qualifications. I would be very pleased to speak with you about her.

Sincerely yours,

Neil S. Siegel
David W. Ichel Professor of Law and Political Science
Associate Dean for Intellectual Life
Director, Duke Law Summer Institute on Law and Policy

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Writing Sample

This is a memorandum written for my Legal Analysis, Research, and Writing course. In the memorandum, we were tasked with examining the applicability of Federal Rule of Civil Procedure 41(d) for the consideration of attorney's fees.

I am happy to provide more context for the assignment if needed.

ISSUE PRESENTED

Federal Rule of Civil Procedure 41(d) states that if a plaintiff brings an action previously dismissed against the same defendant with the same claim, the court "may order the plaintiff to pay all or part of the costs of that previous action." On December 1, 2021, Tray Sparks appealed the district court's Order, which granted the defendant-appellee's motion for Attorney's Fees under Rule 41(d). The question arises whether an award of attorney's fees under Rule 41(d) reflects the court's attempt to redistribute the litigation burdens without any demonstration of Congressional intent.

STATEMENT OF THE CASE

Tray Sparks, the Plaintiff-Appellant, is the owner of a cattle ranch located in Granite County, Montana. JA3. Tray decided to sell the land surrounding his cattle ranch, which was deemed unsuitable for livestock, to his brother's corporation known as Carl Sparks Enterprises, Inc. doing business as Pine Ridge Ski Area (Carl). JA3. As part of the land sale to Carl Sparks Enterprises, Tray took the necessary steps to reserve an easement known as High Pasture Road, which served as a means for him to access his remaining land from US 93. JA3. Every summer, Tray utilized High Pasture Road to graze his cattle. JA28.

In 2021, Tray was dismayed to discover that Carl had deliberately obstructed his access to High Pasture Road. JA4. On February 15, 2021, Tray issued a demand to Carl, urging him to cease blocking High Pasture Road, as Tray firmly believed that such actions constituted a nuisance under the laws of Montana. JA4. Carl refused to comply. JA4. As Carl persisted in his refusal to restore Tray's access to High Pasture Road, Tray's endeavors to develop his ranch were continuously impeded. JA4. Due to the ongoing issue with blocked access to High Pasture Road,

Tray encountered difficulties in securing loans from banks. JA4. Additionally, Tray has encountered significant obstacles in both surveying and selling his lots. JA4. Furthermore, without access to High Pasture Road, Tray is unable to initiate any construction activities on his land. JA4. Time is of the essence for Tray due to the short summers and harsh winters in Montana. JA3. The loss of a construction season under such conditions can result in irreparable consequences. JA5. In response to this looming threat, Tray filed Cause No. 187 against Carl on June 4, 2021, alleging nuisance and fraud, and seeking both monetary and injunctive relief. JA9.

Subsequently, the court scheduled a hearing for July 26, 2021, to address Tray's request for temporary injunctive relief. JA10. In preparation for the hearing, the court issued a pretrial order mandating that Tray and Carl submit their proposed exhibits, stipulations, witness lists, and excerpts of depositions by July 12, 2021. JA10. In anticipation of the hearing, Tray designated Kate Albey as an expert. JA23. Albey represented herself as a Certified Public Accountant (CPA). JA23. When Albey was deposed by Carl, she admitted that she did not receive a degree in accounting and that she did not pass the CPA exam. JA23. Carl filed a motion to strike Albey, but instead of pursuing that course of action, Tray chose to withdraw Albey from her previous designation as an expert. JA23. Tray decided to withdraw Albey because he does not wish to engage in futile litigation. JA23. With each passing day, Tray loses valuable time to initiate construction on his ranch while this lawsuit persists. *See* JA5.

On July 23, 2021, after Tray's withdrawal of Albey, he filed an emergency motion seeking an extension of the pretrial order deadlines. JA10. The court denied Tray’s emergency motion on the same day as his request. JA10. Following that denial, Tray filed a stipulation of dismissal without prejudice. JA10. Carl later tendered an answer to the original complaint. JA10.

Following the dismissal, Tray refiled his complaint without the fraud claim. JA10. Following Tray's submission of the new complaint, Carl made a request for attorney's fees related to the previous claim, with the expectation that they would be paid within 30 days of the court's order as per Rule 41(d). JA10. In addition, Carl requested that the court put a stay on the action until Tray fulfilled the payment of those fees. JA10. Furthermore, Carl requested that the court dismiss Tray's action with prejudice if the fees were not promptly paid. JA10. On September 15, 2021, the court granted Carl's motion and issued an order requiring Tray to pay Carl's attorney's fees within 30 days of the order. JA32. On October 18th, Carl informed the court that Tray had failed to pay the attorney fees as ordered, leading the court to enter a final judgment and dismiss Tray's claim with prejudice. JA33. On December 1, 2021, Tray appealed the court's final judgment and order to the United States Court of Appeals for the Ninth Circuit. JA33.

STANDARD OF REVIEW

The standard of review for an award of attorney's fees is typically abuse of discretion. *See Maag v.* Wessler, 993 F.2d 718, 719 (9th Cir. 1993). However, in this case, the standard of review is de novo because it involves the interpretation of a Federal Rule, which is considered a question of law and is reviewed de novo. *See Harbeson v. Parke Davis, Inc*., 746 F.2d 517, 520 (9th Cir. 1984).

ARGUMENT

I. Attorney's fees are not available through FRCP 41(d) because the plain language and purpose of the rule do not demonstrate congressional intent to alter the American rule.

The lower court's ruling should be reversed because Rule 41(d) does not grant the court the discretion to award attorney's fees. Rule 41(d) was specifically designed to discourage vexatious litigation and forum shopping. *Rogers v. Wal-Mart Stores*, Inc., 230 F.3d 868, 875 (6th Cir. 2000). It states that "if a plaintiff who previously dismissed an action in any court files an action based on or including the same claim against the same defendant, the court: (1) may order the plaintiff to pay all or part of the costs of that previous action: and (2) may stop the proceedings until the plaintiff has complied." Fed. R. Civ. P. 41(d). Rule 41(d) is a form of statutory authorization. *See Esquivel v. Arau*, 913 F.Supp.1382, 1390 (9th Cir. 1996). Therefore, the court's power is confined to the application of Rule 41(d). *See Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126 (1989) (stating that the "task of the court is to apply the text, not to improve upon it" in regards to the interpretation of Federal Rule of Civil Procedure 11). Thus, it is essential to establish the intent of Congress in order to make a determination. *Id.* The Court is not empowered to modify Rule 41(d) to pursue a specific objective that would compromise the textual interpretation. *See id.*

When interpreting statutes that encroach upon common law principles, there is a presumption in favor of maintaining the 'long-established and familiar principles' that have been entrenched over time. *See Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952). One such principle is the American Rule, which generally stated that the prevailing party in a lawsuit is not entitled to seek reimbursement for attorney's fees. *See Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 245 (1975). Given that attorney's fees were historically governed by the American Rule, a common-law principle, the court is obliged to presume that Congress intended to uphold its fundamental principles. *See id.* It is important to note that the American Rule does have limited exceptions, including specific provisions for attorney's fees under certain federal statutes, cases

involving willful disobedience of a court order, and instances of bad faith. *See id.* The Supreme Court has consistently rejected requests to expand these exceptions, as it considers it inappropriate for the Judiciary to redistribute the burdens of litigation without legislative guidance. *Id*. at 247. Therefore, in this case, this Court should likewise reject the request to broaden the exceptions to the American Rule, including Rule 41(d), due to the lack of legislative guidance demonstrating such intent. *See id.*

Despite the existence of the American Rule, a circuit split exists regarding whether Rule 41(d) can authorize an award of attorney's fees. *Portillo v. Cunningham*, 872 F.3d 728, 738 (5th Cir. 2017). To date, this Court has not issued a decision regarding the authorization of attorney's fees under Rule 41(d). However, several other Circuits have issued opinions. The Sixth Circuit has held that attorney fees cannot be awarded under Rule 41(d) because the rule does not explicitly provide for them. *See Rogers*, 230 F.3d at 874. The Court reasoned that historical practice indicated that Congress has consistently required explicit authorization when intending to allow attorney fees. *Id.* The Sixth Circuit is correct to acknowledge that Congress possesses knowledge of the distinction between 'costs' and 'attorney fees' and exercised caution in its language when approving Rule 41(d). *Id.*

Both the Eighth and Tenth Circuits have upheld the awarding of fees without delving into an extensive discussion. *See Portillo*, 872 F.3d at 738. In a concise Per Curiam opinion, the Eighth Circuit held that attorney's fees could be awarded under Rule 41(d) without specifically analyzing whether the term 'costs' encompasses attorney's fees. *See Evans v. Safeway Stores, Inc*., 623 F.2d 121, 121- 22 (8th Cir. 1980). In an unpublished opinion, in a case where the plaintiff-appellant appeared pro se, the Tenth Circuit held that the trial court possesses the discretion to impose both

costs and attorney's fees under Rule 41(d). *See Meredith v. Stovall*, No. 99-350, 2000 WL 807355, at *1 (10th Cir. June 23, 2000). However, in its holding, the Tenth Circuit explicitly referenced both 'costs' and 'attorney's fees,' clearly indicating that the court recognizes a distinction between the two terms. *See id.*

The Third, Fourth, Fifth, and Seventh Circuits have held that attorney's fees are only available under Rule 41(d) if the underlying statute explicitly defines costs to include fees. *Portillo,* 872 F.3d at 738. These Circuits relied on the precedent established in *Marek v. Chesny*, 473 U.S. 1, 10 (1985), where the interpretation of Rule 68 of the Federal Rules of Civil Procedure (FRCP) considered attorney's fees as part of the definition of 'costs' only when the underlying statute explicitly included fees within the scope of costs. *See also Portillo*, 872 F.3d at 739; *see also Esposito v. Piatrowski*, 223 F.3d 497, 500 (7th Cir. 2000); *Andrews v. Am.'s Living Ctrs., LLC*, 827 F.3d 306, 309-12 (4th Cir. 2016); *Garza v. Citigroup Inc.*, 881 F.3d 277, 279 (3rd Cir. 2018). While this position acknowledges the importance of the American Rule in its interpretation, it neglects to consider the distinct procedural postures of Rule 68 and Rule 41(d). *See Marek,* 473 U.S at 10. Rule 68 provides for settlement offers and Rule 41(d) provides for dismissals. The divergent procedural postures of the Rules make them incompatible for direct comparison since they have different capacities to limit a plaintiff's access to the court. *See Marek,* 473 U.S. at 10.

This Court should conclude that attorney's fees are not available under Rule 41(d) since the rule's plain language and purpose do not indicate any congressional intent to modify the American rule. *See Rogers*, 230 F.3d at 874. First, neither the plain meaning of the term "costs" nor the broader statutory scheme of the Federal Rules supports the inclusion of attorney's fees within its definition. *See id*. The fact that multiple Federal Rules of Civil Procedure explicitly reference

attorney's fees suggests that the drafters of these Rules were aware of the distinction between "costs" and "attorney's fees." *See id.* at 875. Second, allowing the awarding of attorney's fees under Rule 41(d) would effectively create a new exception to the long-standing American Rule, without necessitating a clear demonstration of Congressional intent. *See Alyeska*, 421 U.S. at 247. Given these compelling reasons, it is imperative that the lower court's decision to award attorney's fees be overturned.

A) <u>Rule 41(d) does not demonstrate congressional intent to alter the American Rule because the plain meaning of "costs" does not include attorney's fees.</u>

The Supreme Court gives the Federal Rules of Civil Procedure their plain meaning. *See Pavelic & LeFlore*, 493 U.S. at 123. Therefore, the interpretation of Rule 41(d)'s reference to "costs" begins by examining the plain meaning of "costs." *See Whittlestone, Inc. v. Handi-Craft Co.*, 618 F.3d 970, 973 (9th Cir. 2010). When the Advisory Committee on Civil Rules drafted Rule 41(d), Black Law's Dictionary defined cost as "a pecuniary allowance, made to the successful party, for his expenses in prosecuting or defending a suit or a distinct proceeding within a suit." *Costs*, Black's Law Dictionary (3rd ed. 1933); *see also Bailey v. U.S.*, 516 U.S. 137, 137 (1995) (noting that the dictionary can be used to determine the plain meaning of a word). This definition highlights the fundamental difference in nature between costs and fees, explicitly stating that they are "altogether different" and that "costs do not include attorney's fees." *Costs*, Black's Law Dictionary (3rd ed. 1933). Therefore, the plain meaning of costs explicitly recognizes the inherent distinction between costs and fees, underscoring the contrast between these two types of awards and emphasizing that costs do not include attorney's fees.

Furthermore, the presence of other provisions within Rule 41 itself suggests that the drafters were aware of language that could explicitly encompass an interpretation allowing for the inclusion of attorney's fees. *See City of Chicago v. Envtl. Def. Fund*, 511 U.S. 328, 337-38 (1994) (holding that if Congress elsewhere used language that more clearly captures an interpretation urged by one of the parties, it might suggest that the disputed term should not be given that construction). For instance, Rule 41(a)(2) (emphasis added) establishes that an action may be dismissed at the plaintiff's request only by court order, on *terms* that the court considers proper. It is widely accepted that attorney's fees can be granted under this rule. *See e.g., Esquivel*, 913 F.Supp.1382 at 1389. Rule 41(a)(2) indicates that the drafters of Rule 41(d) could draft a rule that provides courts with broader discretion when dismissing a claim. *See Envt. Def. Fund*, 511 U.S. at 337-38. The use of "costs" in Rule 41(d) instead of "terms" is meaningful because when Congress uses two different terms it is assumed each is intended to have a particular meaning. *See Bailey*, 516 U.S. at 146. Thus, "terms" and "costs" should not be interpreted to have the same meaning. Moreover, several other Federal Rules directly refer to attorney's fees. For example, FRCP 30(g)(2) states that "a party who, expecting a deposition to be taken, attends in person or by an attorney may recover reasonable expenses for attending, including attorney's fees." Fed. R. Civ. P. 30(g)(2). This further supports the argument that the drafters of Rule 41(d) were aware of alternative language that could more explicitly encompass an interpretation allowing for the award of attorney's fees. *See Envl. Def. Fund*, 511 U.S. at 337-38. Given these considerations, it is clear that the term "costs" in Rule 41(d) should not be given the same interpretation as "attorney's fees" or "terms." The drafters of the rule were aware of alternative language that could more explicitly

address attorney's fees, and the distinct provisions within Rule 41 and other Federal Rules further support this interpretation.

Finally, it is worth noting that while the Supreme Court has granted attorney's fees under Rule 68 of the Federal Rules of Civil Procedure, the reasoning and factors considered in that decision do not lead to the same outcome when applied to Rule 41(d). *See Marek*, 473 U.S. at 9-11. This distinction arises because Rule 68 specifically relates to settlement offers, whereas Rule 41(d) pertains to dismissals. *Id.* The purpose of Rule 68 is to encourage the resolution of a lawsuit through settlement. *See id.* at 5. The American Rule provides an exception for attorney's fees when the underlying statute allows for costs also to be awarded typically at the end of a suit. *See Alyeska*, 421 U.S. at 247. Rule 68 and the traditional exception to the American Rule serve the same purpose in a way that Rule 41(d) does not. The Court reasoned that attorney's fees were awardable as costs under Rule 68 because it does not curtail plaintiffs' access to the court. *See Marek*, 473 U.S. at 10. Here, allowing attorney's fees under Rule 41(d) could curtail plaintiffs' access to the courts and significantly deter them from bringing suit if they cannot afford to pay a defendant's attorney's fees. *See id.* Thus, the reasoning in *Marek* is inapplicable to Rule 41(d) and should not be applied to demonstrate congressional intent to award attorney's fees when a plaintiff dismisses a suit. *See id.* In conclusion, the plain language of "costs" in Rule 41(d) and throughout the Rules of Civil Procedure demonstrates a lack of congressional intent to alter the American Rule by granting attorney's fees outside of its few and narrow exceptions.

Finally, it is worth noting that the Supreme Court's decision in *Marek v. Chesny*, which granted attorney's fees under Rule 68 of the Federal Rules of Civil Procedure, does not lead to the same outcome when applied to Rule 41(d) of the Rules. This distinction arises because Rule 68

specifically relates to settlement offers, while Rule 41(d) pertains to dismissals. The purpose of Rule 68 is to encourage the resolution of a lawsuit through settlement, incentivizing parties to make reasonable settlement offers. *Marek v. Chesny*, 473 U.S. at 5. The Court in *Marek* concluded that attorney's fees were awardable as costs under Rule 68 because it did not restrict plaintiffs' access to the court. *See id.* at 10. However, allowing attorney's fees under Rule 41(d) could potentially limit plaintiffs' access to the courts and discourage them from filing suits if they cannot afford to bear the burden of a defendant's attorney's fees. *See id.* Thus, the reasoning applied in Marek is not applicable to Rule 41(d) and should not be relied upon to establish congressional intent to award attorney's fees when a plaintiff dismisses a lawsuit. *See id.*

B) <u>Granting attorney's fees under Rule 41(d) would alter the American Rule without a demonstration of Congressional intent.</u>

The purpose of Rule 41(d) is "to deter forum shopping and vexatious litigation." *Rogers*, 230 F.3d at 875. Some Circuit Courts have argued that awarding attorney's fees "as part of costs" aligns with the purpose of Rule 41(d). *Esposito*, 233 F.3d at 501. However, even if it is evident that a particular interpretation of a rule would better serve its purpose, the court does not have the freedom to pursue that objective. *See Pavelic & LeFlore*, 493 U.S. at 126. It is the task of the court to "apply the text, not to improve upon it." *Id.* The current language of Rule 41(d) does not contain a provision for attorney's fees. In the case *Esquivel v. Arau*, the district court argued that Rule 41(d) serves as a codification of the bad faith exception to the American Rule. *See Esquivel*, 913 F. Supp at 1390 – 91. However, "there is no requirement of a showing of subjective bad faith either in the language of Rule 41(d) or in the relevant case law." *See id.* at 1388. Therefore, the court is unable to incorporate a "bad faith" requirement into Rule 41(d) to

enhance the fulfillment of the Rule's purpose. *Pavelic & LeFlore*, 493 U.S at 126. The court must "simply assess whether a plaintiff's conduct satisfies the requirements of Rule 41(d). *See Esquivel*, 913 F. Supp. at 1388. Here, the plaintiff has not acted in bad faith. Tray Sparks is trying to regain access to his land under the crunch of time. JA5. Tray withdrew Albey from her previous expert designation because he does not wish to engage in pointless litigation. JA23. Every day this suit continues, Tray is losing time and money to develop his ranch. JA5. His situation does not fall under any of the exceptions of the American Rule, but if "costs" are interpreted to include attorney's fees it will become a new exception under the guise of furthering the purpose of Rule 41(d). This will curtail the access that many Americans have to the justice system as they will may have to pay for the other parties attorney's fees anytime they need to refile a claim. In conclusion, Rule 41(d) does not allow for attorney fees. A court's grant of attorney fees under Rule 41(d) amounts to creating an exception to American rule without congress's clear intent to do so.

BRIEF CONCLUSION

Because of the lack of Congressional intent to award attorney's fees under Rule 41(d), the district court's judgment and order dismissing this case with prejudice should be reversed, and the case remanded for trial.

Date: March 21, 2022

Attorneys for Appellant Tray Sparks

Applicant Details

First Name	**Alexander**
Middle Initial	**J**
Last Name	**Hartman**
Citizenship Status	**U. S. Citizen**
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Contact Phone Number	**7049032020**

Applicant Education

BA/BS From	**University of North Carolina-Chapel Hill**
Date of BA/BS	**December 2020**
JD/LLB From	**The George Washington University Law School** **https://www.law.gwu.edu/**
Date of JD/LLB	**May 19, 2024**
Class Rank	**15%**
Law Review/Journal	**Yes**
Journal(s)	**Federal Circuit Bar Journal**
Moot Court Experience	**Yes**
Moot Court Name(s)	**1L Moot Court Competition**

Bar Admission

Prior Judicial Experience

Judicial Internships/ Externships	**Yes**
Post-graduate Judicial Law Clerk	**No**

Specialized Work Experience

Specialized Work Experience	**Pro Se**

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This applicant has certified that all data entered in this profile and any application documents are true and correct.

ALEXANDER HARTMAN

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June 22, 2023

The Honorable Jamar K. Walker
U.S. District Court for the Eastern District of Virginia, Norfolk Division
Walter E. Hoffman U.S. Courthouse
600 Granby Street
Norfolk, VA 23510

Dear Judge Walker:

I am a rising third-year law student at The George Washington University Law School writing to apply for a 2024–25 clerkship and, alternatively, for any future clerkship terms for which you may be hiring. Having served as a judicial intern in two other federal jurisdictions, I would cherish the opportunity to return to the judiciary to serve as a clerk in the Eastern District of Virginia. I am particularly eager to serve in your chambers given your background in public service.

As an aspiring federal litigator with extensive legal research and writing experience, I am confident I would make a meaningful addition to your chambers. In my two federal judicial internships, I gained extensive in-chambers collaboration skills and developed strong relationships with clerks and judges which solidified my desire to pursue a clerkship. I have developed a professionalized approach to legal research and writing both in the judiciary and as an intern in various government agencies.

I look forward to discussing how I can apply these skills and qualifications to your chambers. Enclosed please find my resume, writing sample, and transcripts. My writing sample is a bench memorandum I wrote for Judge Kelly. Finally, letters of recommendation from Professors Pont, Kedian, and Dickinson are included. Thank you for your consideration.

Sincerely,

Alex Hartman

ALEXANDER HARTMAN

825 New Hampshire Avenue NW, Apt 208, Washington, DC 20037 | (704) 903-2020 | alexhartman@law.gwu.edu

EDUCATION

The George Washington University Law School — **Washington, DC**
Juris Doctor Candidate — Expected May 2024
GPA: 3.700; *George Washington Scholar* (Top 1–15% of class, as of Spring 2023)
Journal: *Federal Circuit Bar Journal* (Notes Editor, 2023–24)
Honors: Dean's Recognition for Professional Development
Activities: Writing Fellow (2023–24); Law School Tutor (Contracts, Property, Criminal Law); Space Law Society (Founding Member); National Security Law Association; International Law Society; Moot Court and Mock Trial Competitions

The University of North Carolina at Chapel Hill — **Chapel Hill, NC**
B.A. in Political Science; Germanic and Slavic Languages and Literatures — Dec. 2020
GPA/Honors: 3.857; *Degree with Highest Distinction*
Thesis: *Die Theaterrolle von ehrenhaften Tod in dem NS-Totenkult Deutschlands*
Study Abroad: Ruprecht-Karls-Universität Heidelberg, Heidelberg, Germany (Spring 2019)

PROFESSIONAL EXPERIENCE

United States Department of Justice, National Security Division — **Washington, DC**
Legal Intern, Foreign Investment Review Section — Fall 2023

United States Office of Special Counsel — **Washington, DC**
Legal Intern, Investigation and Prosecution Division — May 2023 – Present
- Conduct legal research to support prosecutions of whistleblower reprisals and other prohibited personnel practices
- Draft compliance memoranda for federal agencies and briefs for prosecutions before the Merit Systems Protection Board
- Interview complainants to compile facts for investigation reports

United States Attorney's Office — **Washington, DC**
Legal Intern, National Security Section — Jan. 2023 – April 2023
- Conducted legal research and drafted legal memoranda regarding international terrorism, export control violations, threats against high-ranking public officials, extraterritorial violence, and other sensitive matters
- Assisted federal prosecutors in drafting motions and preparing for trial and hearings

United States District Court for the District of Columbia — **Washington, DC**
Judicial Intern for the Hon. Timothy J. Kelly — Sept. 2022 – Nov. 2022
- Composed draft opinions regarding environmental regulation disputes and employment discrimination cases
- Drafted bench memoranda and conducted legal research regarding cross motions for summary judgment in an APA case and motions to dismiss in seditious conspiracy and FOIA cases
- Observed criminal and civil jury trials, sentencings, and other court proceedings

United States Court of Federal Claims — **Washington, DC**
Judicial Intern for the Hon. Kathryn C. Davis — May 2022 – July 2022
- Wrote a judicial opinion analyzing pro se claims of military disability retirement pay
- Conducted legal research and drafted legal memoranda regarding government contracts, federal procurement law, Indian law, and federal tax violations

SKILLS | INTERESTS

- Fluent in German, Eagle Scout | Fall 2022 VOLO Soccer Champion, learning popular but overplayed guitar covers

THE GEORGE WASHINGTON UNIVERSITY

WASHINGTON, DC

OFFICE OF THE REGISTRAR

GWid : G31671363
Date of Birth: 17-JUN

Date Issued: 05-JUN-2023

Record of: Alexander J Hartman

Page: 1

Student Level: Law
Admit Term: Fall 2021

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ALEXHARTMAN@GWU.EDU

REFNUM:5600792

Current College(s):Law School
Current Major(s): Law

GEORGE WASHINGTON UNIVERSITY CREDIT:

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2021			
	Law School		
	Law		
LAW 6202	Contracts Chatman	4.00	A
LAW 6206	Torts Schoenbaum	4.00	B
LAW 6212	Civil Procedure Smith	4.00	B+
LAW 6216	Fundamentals Of Lawyering I Pont	3.00	A-
	Ehrs 15.00 GPA-Hrs 15.00 GPA 3.489		
	CUM 15.00 GPA-Hrs 15.00 GPA 3.489		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		
Spring 2022			
	Law School		
	Law		
LAW 6208	Property Nunziato	4.00	A
LAW 6209	Legislation And Regulation Schaffner	3.00	A
LAW 6210	Criminal Law Cottrol	3.00	A
LAW 6214	Constitutional Law I Morrison	3.00	B
LAW 6217	Fundamentals Of Lawyering II Pont	3.00	A-
	Ehrs 16.00 GPA-Hrs 16.00 GPA 3.750		
	CUM 31.00 GPA-Hrs 31.00 GPA 3.624		
	Good Standing		
	DEAN'S RECOGNITION FOR PROFESSIONAL DEVELOPMENT		
	THURGOOD MARSHALL SCHOLAR		
	TOP 16%-35% OF THE CLASS TO DATE		

********** CONTINUED ON NEXT COLUMN **********

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2022			
	Law School		
	Law		
LAW 6520	International Law Steinhardt	4.00	A
LAW 6668	Field Placement Mccoy	3.00	CR
LAW 6669	Judicial Lawyering Ortiz	2.00	A-
LAW 6870	National Security Law On Dickinson	3.00	A
	Ehrs 12.00 GPA-Hrs 9.00 GPA 3.926		
	CUM 43.00 GPA-Hrs 40.00 GPA 3.692		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1%-15% OF THE CLASS TO DATE		
Spring 2023			
LAW 6230	Evidence	4.00	B+
LAW 6360	Criminal Procedure	4.00	A
LAW 6667	Advanced Field Placement	0.00	CR
LAW 6668	Field Placement	3.00	CR
LAW 6893	Disinfo, Natsec, & Cybersec	2.00	A
	Ehrs 13.00 GPA-Hrs 10.00 GPA 3.733		
	CUM 56.00 GPA-Hrs 50.00 GPA 3.700		
	Good Standing		
	GEORGE WASHINGTON SCHOLAR		
	TOP 1% - 15% OF THE CLASS TO DATE		
Fall 2022			
	Law School		
	Law		
LAW 6657	Fed Circuit Bar Jrnl Note Credits In Progress:	1.00 1.00	----------
Spring 2023			
LAW 6657	Fed Circuit Bar Jrnl Note Credits In Progress:	1.00 1.00	----------

********** CONTINUED ON PAGE 2 **********

Katie Cloud
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THE GEORGE WASHINGTON UNIVERSITY

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GWid : G31671363
Date of Birth: 17-JUN

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Page: 2

SUBJ NO	COURSE TITLE	CRDT	GRD PTS
Fall 2023			
LAW 6218	Prof Responsibility & Ethics	2.00	----------
LAW 6640	Trial Advocacy	3.00	----------
LAW 6666	Research And Writing Fellow	2.00	----------
LAW 6882	Foreign Intel Surv Act (Fisa)	2.00	----------
LAW 6883	Counterintelligence Law&Policy	2.00	----------
LAW 6886	Domestic Terrorism	2.00	----------
	Credits In Progress:	13.00	

********** TRANSCRIPT TOTALS **********

	Earned Hrs	GPA Hrs	Points	GPA
TOTAL INSTITUTION	56.00	50.00	185.00	3.700
OVERALL	56.00	50.00	185.00	3.700

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Katie Cloud
Interim University Registrar

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EXPLANATION OF COURSE NUMBERING SYSTEM
All colleges and schools beginning Fall 2010 semester:

1000 to 1999	Primarily introductory undergraduate courses.
2000 to 4999	Advanced undergraduate courses that can also be taken for graduate credit with permission and additional work.
5000 to 5999	Special courses or part of special programs available to all students as part of ongoing curriculum innovation.
6000 to 6999	For master's, doctoral, and professional-level students; open to advanced undergraduate students with approval of the instructors and the dean or advising office.
8000 to 8999	For master's, doctoral, and professional-level students.

All colleges and schools except the Law School, the School of Medicine and Health Sciences, and the School of Public Health and Health Services before Fall 2010 semester:

001 to 100	Designed for freshman and sophomore students. Open to juniors and seniors with approval. Used by graduate students to make up undergraduate prerequisites. Not for graduate credit.
101 to 200	Designed for junior and senior students. With appropriate approval, specified courses may be taken for graduate credit by completing additional work.
201 to 300	Primarily for graduate students. Open to qualified seniors with approval of instructor and department chair. In School of Business, open only to seniors with a GPA of 3.00 or better as well as approval of department chair and dean.
301 to 400	Graduate School of Education and Human Development, School of Engineering and Applied Science, and Elliott School of International Affairs – Designed primarily for graduate students. Columbian College of Arts and Sciences – Limited to graduate students, primarily for doctoral students. School of Business – Limited to doctoral students.
700s	The 700 series is an ongoing program of curriculum innovation. The series includes courses taught by distinguished University Professors.
801	This number designates Dean's Seminar courses.

The Law School
Before June 1, 1968:

100 to 200	Required courses for first-year students.
201 to 300	Required and elective courses for Bachelor of Laws or Juris Doctor curriculum. Open to master's candidates with approval.
301 to 400	Advanced courses. Primarily for master's candidates. Open to LL.B or J.D. candidates with approval.

After June 1, 1968 through Summer 2010 semester:

201 to 299	Required courses for J.D. candidates.
300 to 499	Designed for second- and third-year J.D. candidates. Open to master's candidates only with special permission.
500 to 850	Designed for advanced law degree students. Open to J.D. candidates only with special permission.

School of Medicine and Health Sciences and
School of Public Health and Health Services before Fall 2010 semester:

001 to 200	Designed for students in undergraduate programs.
201 to 800	Designed for M.D., health sciences, public health, health services, exercise science and other graduate degree candidates in the basic sciences.

CORCORAN COLLEGE OF ART + DESIGN

The George Washington University merged with the Corcoran College of Art + Design, effective August 21, 2014. For the pre-merger Corcoran transcript key, please visit http://go.gwu.edu/corcorantranscriptkey

THE CONSORTIUM OF UNIVERSITIES OF THE WASHINGTON METROPOLITAN AREA

Courses taken through the Consortium are recorded using the visited institutions' department symbol and course number in the first positions of the title field. The visited institution is denoted with one of the following GW abbreviations.

AU	American University	MMU	Marymount University
CORC	Corcoran College of Art & Design	MV	Mount Vernon College
		NVCC	Northern Virginia Community College
CU	Catholic University of America	PGCC	Prince George's Community College
GC	Gallaudet University	SEU	Southeastern University
GU	Georgetown University	TC	Trinity Washington University
GL	Georgetown Law Center	USU	Uniformed Services University of the Health Sciences
GMU	George Mason University		
HU	Howard University	UDC	University of the District of Columbia
MC	Montgomery College	UMD	University of Maryland

GRADING SYSTEMS

Undergraduate Grading System

A, Excellent; *B*, Good; *C*, Satisfactory; *D*, Low Pass; *F*, Fail; *I*, Incomplete; *IPG*, In Progress; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *P*, Pass; *NP*, No Pass; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the *I* is replaced by the final grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 2011: The grading symbol RP indicates the class was repeated under Academic Forgiveness.
Effective Fall 2003: The grading symbol R indicates need to repeat course.
Prior to Summer 1992: When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I/* and the grade.
Effective Fall 1987: The following grading symbols were added: *A-, B+, B-, C+, C-, D+, D-*.
Effective Summer 1980: The grading symbols: *P*, Pass, and *NP*, No Pass, replace *CR*, Credit, and *NC*, No Credit.

Graduate Grading System

(Excludes Law and M.D. programs.) *A*, Excellent; *B*, Good; *C*, Minimum Pass; *F*, Failure; *I*, Incomplete; *IPG*, In Progress; *CR*, Credit; *W*, Authorized Withdrawal; *Z*, Unauthorized Withdrawal; *AU*, Audit. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.
Effective Fall 1994: The following grading symbols were added: *A-, B+, B-, C+, C-* grades on the graduate level.

Law Grading System

A+, A, A-, Excellent; *B+, B, B-*, Good; *C+, C, C-*, Passing; *D*, Minimum Pass; *F*, Failure; *CR*, Credit; *NC*, No Credit; *I*, Incomplete. When a grade is assigned to a course that was originally assigned a grade of *I*, the grade is replaced with *I* and the grade. Through Summer 2014 the *I* was replaced with *I* and the final grade.

M.D. Program Grading System

H, Honors; *HP*, High Pass; *P*, Pass; *F*, Failure; *IP*, In Progress; *I*, Incomplete; *CN*, Conditional; *W*, Withdrawal; *X*, Exempt, *CN/P*, Conditional converted to Pass; *CN/F*, Conditional converted to Failure. Through Summer 2014 the *I* was replaced with *I* and the final grade.

For historical information not included in the transcript key, please visit http://www.gwu.edu/transcriptkey

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The George Washington University Law School
2000 H Street NW
Washington, DC 20052

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend my former student, Alex Hartman, for a clerkship in your chambers. Alex is a strong student with excellent legal research, analysis, and writing skills. I give him my highest recommendation.

Alex enrolled in my national security law class at GW Law School in the fall of 2023, and he soon stood out as one of the very top students in a class of more than 40 students. The course is especially demanding because it covers many bodies of law (international and domestic, constitutional and statutory) and the legal issues are difficult and complex. Students must parse the intricacies of the Foreign Intelligence Surveillance Act (FISA), comprehend the detailed procedures related to criminal prosecutions in U.S. military commissions, as well as understand fundamental principles of constitutional law regarding separation of powers and the use of force. Furthermore, I demand a lot of the students in class, as I use the Socratic method to call on them every day, although I do also take volunteers. The class was particularly demanding in the fall of 2023 because I offered it online. In this online version, I required students to engage in multiple online activities and exercises, for example to post short, written legal memos or videos of themselves making legal arguments on particular issues.

Alex stood out in the class from the beginning of the semester both when called on and as a volunteer in the synchronous class sessions. He was uniformly well-prepared for class and gave thoughtful, careful responses to the questions I posed. In particular, he was not only good at analyzing the case, statute, or treaty at hand but also at evaluating any hypotheticals I would throw at him. For example, in one exchange, I asked Alex to describe the legal basis for the so-called "wall" between intelligence-gathering officials and law-enforcement officials prior to the September 11, 2001 attacks on the United States. He was easily able to identify the cases that had located the requirement for such a "wall" in the Fourth Amendment to the U.S. Constitution, as well as the impact of the "wall" in limiting surveillance of Zacarias Moussaoui, the "20th hijacker" (a replacement for one of the men who conducted the September 11 attacks). Furthermore, Alex was easily able to identify potential counter-arguments to the interpretation of the Fourth Amendment that had formed the basis for the "wall." I should also note that, as a volunteer, Alex contributed well-reasoned, interesting points to the class discussion in a way that engaged other students' perspectives helpfully and respectfully. The class was the better for his participation.

Alex also excelled in the multiple, asynchronous, online activities I assigned. These were numerous and difficult, and many students failed to complete them – but not Alex! He uploaded terrific videos displaying sharp, incisive, legal argumentation skills. For example, he made very impressive arguments, both pro and con, on the question of whether the U.S. executive branch may conduct surveillance of U.S. citizens without first seeking approval from the FISA court, when there is no statutory provision allowing such surveillance. His written assignments were also clear, well-reasoned, and well-written.

I was therefore not surprised when I discovered that Alex had written a top-notch exam, and indeed was one of the very best exams in the class, earning a rare A grade. It was succinct, lucid, beautifully written, and hit all the major points in the issue-spotter questions I had asked. He also produced a carefully-reasoned argument on the other part of the exam, the so-called "policy" question, in which I asked students to recommend amendments to the Foreign Intelligence Surveillance Act (FISA). More broadly, Alex's record shows that his grade in my class was not an aberration but rather the norm for him. At a law school with a strict (and low) grading curve, Alex's academic record is solid and speaks for itself. He graduated with honors and is in the top cohort of his class at GW Law.

Based on Alex's performance in class, I have asked him to serve as my research assistant, and I am very glad that he has accepted. His background indicates that he has very strong research skills. Notably, his undergraduate thesis, "The Theatrical Role of Honorable Death in the National-Socialist German Death Cult," offers a fascinating take on how the fledgling Nazi regime used entertainment media – in particular books, theater plays, radio plays, and movies – to normalize its hateful ideology and to undermine democracy. The common theme of "honorable death" recurred in these pieces, emphasizing the "glory" in dying for the regime. Alex says that this research kickstarted his interest in national security law.

It bears mentioning that Alex has been deeply engaged in leadership roles within the in the GW community. As the faculty director of the law school's program in National Security, Cybersecurity, and Foreign Relations Law, I can attest that as a member of the national security law association, Alex has made important contributions to events and activities at the law school in this area. He has also had an impressive number of government internships, which he has juggled successfully with a strong academic record, and which bodes well for his professionalism and time-management skills. His election to serve as the Notes Editor of the competitive Federal Circuit Bar Journal indicates that his peers respect him. Alex is also a person who knows how to have fun and has interests beyond the law. For example, he is a self-taught guitarist.

Laura Dickinson - ldickinson@law.gwu.edu

In sum, I think highly of Alex. His analytic and writing abilities are strong. And his collegiality and professionalism make it clear that he would be both conscientious and a pleasure to work with. I recommend that you give his application very careful consideration.

Best regards,

Laura A. Dickinson
Oswald Symister Colclough Research Professor
and Professor of Law

June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I write to recommend Alexander Hartman for a clerkship. Alex is a bright and capable rising third year law student who would be an invaluable asset your chambers.

Alex was my student in my first year Fundamentals of Lawyering class at The George Washington University Law School. This is a year-long course and he was one of 16 students in this small class. I have gotten to know Alex well both inside and outside the classroom during his first two years at GW. I feel qualified to appraise his writing skills, analytical ability, professional judgment, and work ethic, among other qualities.

Fundamentals of Lawyering encompasses the traditional legal research and writing curriculum, but filters it through a client service lens. Students represent a “client” in the fall and the spring and focus on “solving a problem” for their client and communicating those solutions. Through this class, Alex demonstrated all of the skills required of a strong law clerk. He is a strong writer and sound analytical thinker. He is a particularly strong predictive writer and his objective memos are clear, concise, and structured well. He’s therefore particularly well-suited to writing bench memos and judicial opinions.

Alex’s strong writing skills earned him a place as a GW Law Writing fellow, essentially a writing tutor for first year students. Alex was selected to be a writing fellow after a competitive application process and bested many other candidates for the coveted position.

Alex’s oral presentation abilities are also strong. He excelled in our trial and appellate level arguments, but equally important in our mock “report to supervisor” research conferences.

As part of the Fundamentals of Lawyering curriculum, students also meet with and interview a mock client. Alex excelled in this particular exercise. He diffused a difficult situation with an unhappy “client” displaying exemplary listening skills and high EQ. His maturity and unflappable grace under pressure sets him apart from other students I have taught. Alex is relatable and unpretentious and “wears well” in repeated interactions with strangers and colleagues alike. He inspires trust in others through his unusual combination of aptitude and humility, qualities that will make him an excellent clerk.

Alex is also a self-directed learner who puts the same effort into ungraded assignments as he does into graded assignments. Unlike some students who approach law school just to get an “A,” Alex always demonstrated deep commitment to the learning process and to bettering his skills.

As a clerk, you can trust Alex to take initiative and step out of his comfort zone though he will always seek advice and counsel when appropriate. This maturity of judgment sets him apart from other students and is a quality that will serve him well in clerkship and in practice.

On a personal note, Alex is a quiet leader in the classroom who is liked and respected by his peers. He was a thoughtful contributor to class discussions and a cooperative team player during group exercises. I was unsurprised to learn that Alex enjoys playing team sports in his spare time because he is the consummate team player in the classroom.

Alex’s skills and personality traits will make Alex a successful clerk and the type of lawyer our profession needs more of. I recommend him without reservation. If I can provide more information about his qualifications, please do not hesitate to contact me.

Sincerely.

Erika N. Pont

Visiting Professor of Law
Interim Associate Director, Fundamentals of Lawyering Program
The George Washington University Law School
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June 22, 2023

The Honorable Jamar Walker
Walter E. Hoffman United States Courthouse
600 Granby Street
Norfolk, VA 23510-1915

Dear Judge Walker:

I am writing to recommend Alex Hartman for a clerkship with your chambers. Alex is an extremely talented 2L (soon to be rising 3L) at George Washington University Law School, and I had the pleasure of teaching him in my Disinformation, National Security, and Cybersecurity course in the Spring of 2023. Alex always came to class prepared, turned in outstanding written work, and provided insightful comments during class discussions – in short, he is an exceptional student. In a competitive class of 26 students, Alex's final grade in the class was an "A." Each of his required three papers was well written, well organized, contained a clear thesis, and demonstrated excellence in legal analysis and statutory interpretation.

Alex has already developed an impressive resume. His prior experience as a Judicial Intern for Judge Timothy Kelly on the U.S. District Court for the District of Columbia and for Judge Kathryn Davis on the U.S. Court of Federal Claims will prepare him well for a clerkship in your chambers, as will his prior experience interning with National Security Section at the U.S. Attorney's Office for the District of Columbia. He also will add to those stellar credentials and further hone his legal skills with internships this summer and fall at the United States Office of Special Counsel and the Department of Justice's National Security Division, respectively.

Earlier in my career, I served as a law clerk for a judge on the U.S. Court of Appeals for the 10th Circuit, and I believe Alex's sharp intellect, stellar writing skills, natural inquisitiveness, and sincerity would make him an outstanding law clerk. As a former prosecutor and official with the U.S. Department of Justice, I am heartened to see students like Alex demonstrating a desire to dedicate their skills to our country's justice system. I hope you make the decision to interview and hire Alex – you will not be disappointed. Please do not hesitate to contact me at the email address below if I can be of additional assistance.

Sincerely,

Kathleen M. Kedian
Professorial Lecturer in Law
The George Washington University Law School
kkedian@law.gwu.edu

ALEXANDER HARTMAN

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WRITING SAMPLE

The attached writing sample is a bench memo I wrote for Judge Kelly during my judicial internship at the United States District Court for the District of Columbia. This memo contains my wholly original legal analysis and research and has not been edited by anyone except myself.

For brief context, Judge Kelly asked me to analyze three legal questions presented in a case before him.[1] In that case, pro se Plaintiff sued Defendant in the D.C. Superior Court alleging federal employment discrimination. Defendant removed the case to federal district court and filed a motion to dismiss, alleging various jurisdictional and cause-of-action defects in the complaint. This memo provides relevant case law and advises chambers on disposition of the motion.

[1] Pursuant to Judge Kelly's writing sample policy, this sample omits the specific facts of the case and anonymizes legal analysis of the motion. Certain identifiable language, such as party names and Executive Orders relied upon for relief, have been altered, omitted, or redacted.

To: Judge Kelly
From: Alex Hartman
Date: Fall 2022 Internship
Re: Legal Issues Presented in *Plaintiff v. Defendant*, 22-CV-1234

MEMORANDUM

You asked me to analyze legal questions presented by Defendant in his Motion to Dismiss for lack of subject-matter jurisdiction and failure to state a claim. Specifically, you asked me to answer the following three questions: (1) whether the Court has jurisdiction to enforce Executive Order [redacted]; (2) whether the Court has subject-matter jurisdiction to hear Plaintiff's Title VII claim; and (3) whether Plaintiff is entitled to a *Bivens* cause of action.

This memorandum will provide a factual background [omitted] and the relevant legal standards before analyzing case law for each legal question posed in the order above. In short, the Court neither has jurisdiction to enforce Executive Order [redacted] nor to hear Plaintiff's Title VII claim. Although jurisdiction is proper regarding Plaintiff's *Bivens* claim, the Court should find that Plaintiff is not entitled to relief under that cause of action.

I. Background

[Pursuant to Judge Kelly's writing sample policy, the specific facts of this case are omitted from this writing sample].

II. Legal Standards

A. Rule 12(b)(1) Motion to Dismiss

Under Rule 12(b)(1) of the Federal Rules of Civil Procedure, a claim must be dismissed if a district court lacks subject-matter jurisdiction to entertain the claim. FED. R. CIV. P. 12(b)(1). When a defendant files a motion to dismiss on multiple grounds, the Court must first examine the Rule 12(b)(1) challenges, because "if it must dismiss the complaint for lack of subject[-]matter jurisdiction, the accompanying defenses and objections become moot and do not need to be

determined." *Schmidt v. U.S. Capitol Police Bd.*, 826 F. Supp.2d 59 (D.D.C. 2011) (citing *U.S. ex rel. Settlemire v. District of Columbia*, 198 F.3d 913, 920 (D.C. Cir. 1999)).

Although their claims are to be "liberally construed," *Estelle v. Gamble*, 429 U.S. 97, 108 (1976), pro se plaintiffs nonetheless bear the burden of establishing that the Court has subject-matter jurisdiction. *Bickford v. Government of U.S.*, 808 F. Supp. 2d 175, 179 (D.D.C. 2011). In deciding whether subject-matter jurisdiction exists, the Court may consider the complaint alone or may consider materials beyond the pleadings. *Id.*

B. Rule 12(b)(6) Motion to Dismiss

Under Rule 12(b)(6) of the Federal Rules of Civil Procedure, the Court must dismiss a complaint if the plaintiff fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). To survive a Rule 12(b)(6) motion to dismiss, a complaint must contain only a "short and plain statement of the claim" showing that the pleader is entitled to relief that gives the defendant fair notice of what the claim is and the grounds upon which it relies. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 545 (2007). In other words, the facts alleged in the complaint must be sufficient "to state a claim to relief that is plausible on its face." *Id.* at 570.

On a Rule 12(b)(6) motion to dismiss, the Court must accept as true all the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89, 94 (2007). Though the complaint is "construed liberally in the plaintiffs' favor, and [the Court should] grant plaintiffs the benefit of all inferences that can be derived from the facts alleged," the Court need not accept inferences drawn by the plaintiff if those inferences are "unsupported by facts alleged in the complaint; nor must the court accept the plaintiff's legal conclusions." *Kowal v. M.C.I. Commc'ns Corp.*, 16 F.3d 1271, 1276 (D.C. Cir. 1994). While pro se complaints are held to a less stringent standard "than complaints drafted by attorneys, 'pro se complaints, like any other, must present a

claim upon which relief can be granted by the court.'" *Boyd v. Chertoff*, 540 F. Supp. 2d 210, 124 (D.D.C. 2008) (quoting *Crisafi v. Holland*, 655 F.2d 1205, 1308 (D.C. Cir. 1981)).

III. Analysis

The following subsections will answer the posed legal questions in the following order: (1) whether the Court has jurisdiction to enforce Executive Order [redacted]; (2) whether the Court has subject matter-jurisdiction over the Title VII claim; and (3) whether Plaintiff is entitled to a Bivens cause of action. Each subsection will provide a short answer followed by case law analysis.

1. Does the Court have jurisdiction to enforce Executive Order [redacted]?

Short answer: the Court does not have jurisdiction because only Congress can waive sovereign immunity and it has not done so here.

"It is axiomatic that the United States may not be sued without its consent and that the existence of consent is a prerequisite for jurisdiction." *United States v. Mitchell*, 463 U.S. 206, 212 (1983). Sovereign immunity is jurisdictional in nature, *F.D.I.C. v. Meyer*, 510 U.S. 471, 475 (1994), and bars suits for money damages against officials in their official capacity absent a specific waiver by the government. *Clark v. Library of Congress*, 750 F.2d 89, 103 (D.C. Cir. 1984).

A waiver of sovereign immunity cannot be implied but must instead "be unequivocally expressed" by Congress. *Irwin v. Dep't of Veteran Affairs*, 498 U.S. 89, 95 (1990). No executive officer can by his action waive sovereign immunity and confer jurisdiction on the courts. *See United States v. Shaw*, 309 U.S. 495, 501 (1940); *see also Carr v. United States*, 98 U.S. 433, 433 (1878) ("Without such [a congressional] act, no direct proceedings will lie at the suit of an individual against the United States or its property; and its officers cannot waive its [sovereign immunity] privilege in this respect"). This "includes the President and all Executive Agencies."

Pettit v. United States, 203 Ct. Cl. 207, 225 (1973) (Skelton, J., dissenting); *see Dep't of the Army v. F.L.R.A.*, 56 F.3d 273, 275 (D.C. Cir. 1995) (officers of the United States have no power to waive federal sovereign immunity absent express provisions by Congress).

Here, Plaintiff brings an action for money damages relying on Executive Order [redacted]. ECF No. 1-1 at 3. An Executive Order issued by the President cannot waive the federal government's sovereign immunity. *See Shaw*, 309 U.S. at 501. Without such waiver, the Court lacks subject-matter jurisdiction to hear Plaintiff's claim.

Even if the Court had subject-matter jurisdiction here, an executive order is privately enforceable only if it is issued pursuant to a statutory mandate or delegation of congressional authority. *In re Surface Mining Regulation Litig.*, 627 F.2d 1346, 1357 (D.C. Cir. 1980). Executive Order [redacted] was issued pursuant to no such mandate or delegation of authority. Instead, Executive Order [redacted] merely provides further amendment to another Executive Order by prohibiting discrimination based on an individual's status as a [omitted]"[2] [Citation omitted]. Further, Executive Order [redacted] explicitly "does not confer any right or benefit enforceable in law or equity against the United States or its representatives." [Citation omitted].

Therefore, because Executive Order [redacted] cannot waive the federal government's sovereign immunity, the Court, and the D.C. Superior Court before removal, is without jurisdiction and should dismiss Plaintiff's Executive Order claim under Rule 12(b)(1).

[2 The specific status protected by the Executive Order is omitted from this sample for anonymity. For clarity, this omitted status was not one of the statutorily protected statuses listed in Title VII (race, color, religion, sex, or national origin)].

2. Does the Court have subject-matter jurisdiction to hear Plaintiff's Title VII claim?

Short answer: the Court is without jurisdiction to hear Plaintiff's Title VII claim under the derivative jurisdiction doctrine.

"The jurisdiction of the federal court on removal is, in a limited sense, a derivative jurisdiction." *Lambert Run Coal Co. v. Baltimore & O.R. Co.*, 258 U.S. 377, 382 (1922). Applying this principle, federal courts have found that if a State court lacks subject-matter jurisdiction over a suit, "the federal court likewise lacks jurisdiction over the suit upon removal." *Merkulov v. United States Park Police*, 75 F. Supp. 3d 126, 129 (D.D.C. 2014)). Put otherwise, if the state court had no subject-matter jurisdiction over the case, then there is no jurisdiction for the federal court to acquire upon its removal—even if the federal court would have possessed original jurisdiction over the matter had it been filed there in the first place. *See Merkulov*, 75 F. Supp. 3d at 129.

Here, the D.C. Superior Court lacked subject-matter jurisdiction over Plaintiff's Title VII claim because, although Title VII does contain a recognized waiver of sovereign immunity in federal courts, it does not waive the United States' sovereign immunity in state courts. *Robinson v. United States Dep't of Health and Hum. Res.*, No. 21-1664-CKK, 2021 WL 4798100 at *4 (D.D.C. Oct. 14, 2021). Specifically, Title VII waives the sovereign immunity of the United States by "authorizing a federal employee who has exhausted his administrative remedies to file a civil action against 'the head of the department, agency, or unit' by which he is employed." *Day v. Azar*, 308 F. Supp. 3d 140, 142 (D.D.C. 2018) (quoting 42 U.S.C. § 2000e–16(c)). In turn, § 2000e-5 makes clear that this waiver applies only to claims filed in each "United States district court and each United States court of a place subject to the jurisdiction of the United States." 42 U.S.C. § 2000e–5(f).